No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES individually, and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

vs.

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners' rights under the Due Process clause of the Fourteenth Amendment were violated when an intermediate Florida court of appeal reversed their money judgments on the ground that Nicaraguan law did not permit recovery of moral damages in their wrongful death actions, in the face of a unanimous advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua plainly declaring that Nicaraguan law *did* permit recovery of moral damages in their actions.

2. Whether, in simply ignoring a unanimous advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua plainly declaring that Nicaraguan law permitted the recovery of moral damages in the petitioners' wrongful death actions, an intermediate Florida court of appeal violated the federal principle of comity known as the "act of state doctrine" in reversing the petitioners' money judgments on the ground that Nicaraguan law did *not* permit recovery of moral damages in their actions.

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The petitioners, Tania Flores de Brenes, individually and as executor, administrator, or personal representative of the estate of Erick Antonio Brenes, decedent, for herself and on behalf of the decedent's survivors, and Claudia Crow, individually and as executor, administrator, or personal representative of the estates of Alfonso G. Wong-Valle and Maria Wong-Valle, decedents, for herself and on behalf of the decedents' survivors, respectfully pray that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Third District, entered in this proceeding on March 9, 1993.

OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, is reported at 625 So.2d 4, and appears in the appendix at pages 1a-6a. The decisions of the Florida Supreme Court denying review of the intermediate appellate court's decision are reported at 632 So.2d 1025, and appear in the appendix at pages 10a-11a.

JURISDICTION

The decision and judgment of the District Court of Appeal of Florida, Third District, was entered on March 9, 1993. Timely motions for rehearing were filed, which were denied on November 3, 1993. The limited review jurisdiction of the Florida Supreme Court was thereafter timely invoked, and review was denied on February 11, 1994. This petition for writ of certiorari was filed within

90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section 1, United States Constitution (emphasis supplied):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At a time when the government of the United States is doing its utmost to encourage and support the fledgling democratic institutions of the Republic of Nicaragua, the decision which we seek to have reviewed here has utterly contemned the authority of all three branches of its government – and provoked a formal protest by the Nicaraguan government to the government of the United States (App. 60a-63a). The decision is, most respectfully, the single most incomprehensible judicial act which undersigned counsel has witnessed in nearly 20 years of practice in the appellate courts of this nation. It affected 34 different wrongful death actions brought by various

Nicaraguan citizens (most of whom lived in Nicaragua, and some of whom resided in Florida) against Honduran defendants for an aviation disaster which occurred on a Honduran mountainside in October, 1989.

In the two cases which are the subject of this petition, which were consolidated with the others, the parties stipulated that the actions were governed by Nicaraguan law and that the defendants would not contest liability for compensatory damages recoverable under Nicaraguan law. The defendants also stipulated that the petitioner in the De Brenes case had suffered $1,000,000.00 in economic damages and $1,500,000.00 in intangible damages (or, as they are known under Nicaraguan law, "moral damages"), but reserved the right to contest the recoverability of moral damages under Nicaraguan law. An evidentiary hearing was held to determine this question, at which the trial court received expert opinion testimony.

The plaintiffs' expert, Dr. Alejandro Montiel Arguello, was eminently qualified. He had been an attorney in Nicaragua for 53 years, and was presently a Judge on the Interamerican Court of Human Rights – a court established by the Organization of American States, whose judges were selected by the ministers of foreign affairs of the OAS' member states. He also served as a consultant to the Foreign Affairs Ministry in Nicaragua. In the past, he had served for one year as permanent ambassador to the United Nations on behalf of Nicaragua; for ten years as the Secretary of State of Nicaragua; for two years as Nicaragua's ambassador to the Republic of Panama; and for an undisclosed period of time as Nicaragua's ambassador to France. He had also served for 10 years as a Justice of the Supreme Court of

Nicaragua, and was Chief Justice of that court for two years. During his lengthy tenure on the Supreme Court, he participated in two of the three decisions upon which the parties were principally relying. (Tr. pp. 128, 213-23).

Dr. Montiel had also authored the following books: "The Supreme Court and International Law," published in Managua in 1967; "The Manual of International Law," published in Managua in 1969, in Costa Rica in 1976, and in Guatemala in 1982; a four-volume treatise entitled "Civil Jurisprudence in Nicaragua," published in Managua in 1971-1977; "The Manual of Private International Law," published in Managua in 1974; a four-volume treatise entitled "Manual of International Laws," published in Managua; and articles concerning the "Law of the Sea," published in Managua in 1971. Dr. Montiel's four-volume treatise on Nicaraguan Civil Jurisprudence contains a summary of all of the decisions handed down by the Supreme Court of Nicaragua since 1913.[1] (Tr. pp. 215-17).

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[1] In contrast, the defendants' expert, Dr. Uriel Mendieta Gutierrez, was a practicing attorney in Nicaragua with a commercial civil practice, who had served as a Justice on the Nicaraguan Supreme Court for four years, between 1974 and 1978; he was the vice-president of that court at the time he retired in 1978 for political reasons. He did not participate in any of the Supreme Court decisions upon which the parties were relying at trial. Although he had been involved in "pretty many trials," his experience with "accident litigation" was limited to representing defendants in traffic violation cases. He had published two articles – one concerning the possession of real property, and one concerning divorce under international law – and had written nothing on the availability of moral damages under Nicaraguan law. He was retained by the defendants three weeks before trial. (Tr. pp. 62-68, 100, 129-30).

The trial court accepted Dr. Montiel's opinions on the subject; ruled that moral damages were recoverable in the actions under Nicaraguan law; and entered a judgment in the De Brenes case in the full amount of the plaintiff's stipulated damages. In the related Crow case, a jury awarded economic damages of $144,000.00 and moral damages of $1,494,000.00 to children who had lost both of their parents in the disaster, and judgment was entered on that verdict. The defendants appealed both judgments to the District Court of Appeal of Florida, Third District, where the appeals were consolidated for all appellate purposes.

In their initial brief (served on August 14, 1992), the defendants argued that, contrary to Dr. Montiel's eminently qualified expert opinions on the subject, (1) moral damages were *not* recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) the Penal Code of Nicaragua provided for the recovery of damages in a quasi-criminal (or tort) action *only* from a person who has been convicted of a crime; and (3) the acquittal of the defendants' agents from criminal charges by the Honduran courts *relieved* them of civil liability for moral damages under the Penal Code.[2]

The defendants also argued that the trial court's ruling should be reviewed *de novo* as a question of law,

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[2] Curiously, the second and third positions were asserted notwithstanding that the defendants' own expert had admitted at trial that, apart from Article 46 of the Penal Code itself (which says no such thing), there is not a single piece of paper in Nicaragua which says such a thing (Tr. pp. 181-83).

rather than as a question of fact requiring expert testimony. And the due process clause of the Fourteenth Amendment was squarely invoked as a constraint upon the court of appeal's power to resolve the legal question before it:

> A state court violates a litigant's due process rights under the Fourteenth Amendment of the United States Constitution when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 . . . (1988).

(Appellants' initial brief, p. 22).

Apparently dismayed by these arguments, knowing that the court of appeal lacked facility in the Spanish language, and convinced that the court of appeal lacked the necessary expertise to resolve the question properly under Nicaraguan law, persons sympathetic to the plaintiffs' position requested the Chief Judge of the Criminal Court in Managua to seek an advisory opinion on the subject from the Supreme Court of Nicaragua. On October 5, 1992, the Supreme Court of Nicaragua, acting under its constitutional authority to do so, issued an advisory opinion declaring that the law of Nicaragua provides for the recovery of moral damages in cases like the instant cases (App. 12a-15a). By a vote of 9-0, the Justices declared (1) that moral damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, moral damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua,

which deal with civil liability for both crimes and "quasi-crimes" (or torts); and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that moral damages are recoverable in such an action under these provisions of the Penal Code.

The plaintiffs filed their appellees' briefs in the consolidated appeals two months later, on December 8, 1992. Because the defendants were certainly correct that the due process clause required that the result in the case not contradict the "clearly established law" of Nicaragua, the plaintiffs did not challenge this constitutional premise. And because the parties had stipulated that Nicaraguan law applied, there was no need to remind the court of the settled principles of international comity. The plaintiffs therefore argued that, according to a prior decision of the court of appeal, the trial court's determination of the law of Nicaragua was essentially a question of fact which could not be overturned on appeal because it was supported by competent expert opinion testimony.

The plaintiffs also supported the trial court's ruling with an extensive analysis of the various provisions of the Nicaraguan Civil and Penal Codes, as well as earlier decisions of the Nicaraguan Supreme Court and the published opinions of various treatise writers which demonstrated the propriety of the trial court's conclusion. The plaintiffs also requested the court to take judicial notice of the Nicaraguan Supreme Court's advisory opinion, as it was required to do by § 90.203, Fla. Stat.; and they argued in their brief that the advisory opinion was conclusive of the propriety of the trial court's ruling. In their reply brief, the defendants contended that the

Nicaraguan Supreme Court's advisory opinion could safely be ignored because only the Nicaraguan National Assembly had the power to "officially interpret the law" under the Nicaraguan Constitution.

A three-judge panel of the court of appeal ultimately reversed the plaintiffs' awards of moral damages in both the De Brenes case and the Crow case (App. 1a-6a). First, the panel held that it was entitled to review the trial court's ruling as a question of law, and simply overruled another panel's prior decision to the contrary. And then – notwithstanding that Florida law provides for the recovery of intangible damages in wrongful death actions and relieves no persons of civil tort liability simply because they have been acquitted of criminal charges arising out of the incident, so there was no public policy of Florida which would have justified a refusal to follow Nicaraguan law – the panel held (1) that moral damages are *not* recoverable under Article 2509 of the Civil Code of Nicaragua; (2) that the Penal Code of Nicaragua provides for the recovery of moral damages *only* from a person who has been convicted of a crime; and (3) that the acquittal of an agent from criminal charges *relieves* the principal of civil liability for intangible damages under the Penal Code. Remarkably, the panel did not even mention the existence of the Nicaraguan Supreme Court's advisory opinion, much less explain why it felt it was competent to decide the substance of Nicaraguan law in a manner squarely contrary to each and every point in that authoritative opinion.

That the court of appeal utterly flouted the authority of the Nicaraguan Supreme Court is undeniable, as a simple side-by-side comparison of the two opinions –

which we will set out in the "Reasons" section which follows – will plainly reveal. In ignoring the Nicaraguan Supreme Court's explanation of Nicaraguan law, the court of appeal apparently accepted the defendants' argument that the opinions of Nicaragua's highest judicial authority need not be respected because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the legislative branch, the National Assembly. Whatever justification that argument might have provided evaporated, however, when, in quick response to the court of appeal's decision, the Nicaraguan National Assembly enacted an "Interpretative Law," duly signed into law thereafter by the President of the Republic of Nicaragua, which was consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law (App. 16a-19a).

In that "Authentic Interpretation," Law No. 157, the National Assembly declared, as had the Supreme Court, (1) that moral damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, moral damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua, which deal with civil liability for both crimes and "quasi-crimes"; and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that moral damages are recoverable in such an action under these provisions of the Penal Code. The Interpretative Law also explained an additional error made by the court of appeal in a miscellaneous aspect of the reasoning stated in its decision.

This Interpretative Law was brought to the court of appeal's attention in a timely motion for rehearing and motion for rehearing en banc (App. 20a-59a). Because the court of appeal's decision was not final at the time these motions were filed, it was permissible to raise this post-decision development by motion for rehearing, and the court of appeal was required to entertain argument upon it. *See City of Miami v. Harris*, 490 So.2d 69 (Fla. 3d DCA 1986) (where United States Supreme Court rendered decision overruling prior precedent while motion for rehearing was pending, court of appeal was required to withdraw its initial decision affirming judgment, grant rehearing, and reverse judgment), *cert. denied*, 479 U.S. 1031 (1987).[3]

In these motions, the plaintiffs reminded the court of appeal of what the defendants themselves had asserted in their initial brief – that a state court violates a litigant's due process rights under the Fourteenth Amendment of the United States Constitution when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." And the motions asserted that, given the advisory opinion of the Nicaraguan Supreme

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[3] *See also Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987) (where decision simply interprets existing law and neither changes nor modifies it, it must be applied to existing cases whose disposition has not become final); *Hampton v. A. Duda & Sons, Inc.*, 511 So.2d 1104 (Fla. 5th DCA 1987) (Supreme Court decision filed while post-decision motion is pending must govern ultimate disposition of the appeal).

Court and the Interpretative Law of the National Assembly of Nicaragua, the result reached by the panel plainly violated the plaintiffs' due process rights and had to be corrected. The motions also urged at length that settled principles of the doctrine of international comity required the same correction.

The defendants responded by arguing that the National Assembly's Interpretative Law was an impermissible *ex post facto* law – to which the plaintiffs replied that it was a permissible explanation of existing law (upon which the defendants had earlier insisted when arguing that only the National Assembly had the constitutional authority to interpret Nicaraguan law), rendered under the authority of Section II, Article IV of the Preliminary Title to the Nicaraguan Civil Code, which reads (in English translation) as follows:

> The law may provide only for the future and shall never have a retroactive effect.
>
> However, laws which are limited to interpreting the meaning of other laws shall be understood as incorporated into such laws; but said laws shall not affect in any manner whatsoever judicial decisions which are final in the time in between.

Because the court of appeal's decision was not yet final (and because the judgment which would be required upon ultimate issuance of the mandate had yet to be entered), this provision should have been dispositive of the conclusive effect of the Interpretative Law on the issue before the court of appeal. Nevertheless, the plaintiffs' post-decision motions were summarily denied (with one judge dissenting to the denial of the motion for

rehearing en banc), with no mention of the Interpretative Law which the Nicaraguan National Assembly had enacted in direct response to the court of appeal's erroneous decision (App. 7a-8a). The court of appeal also denied the plaintiffs' motions that the decision be certified to the Florida Supreme Court for further review (App. 9a).

In Florida, in the absence of a certification by an intermediate court of appeal, the Supreme Court's authority to review a decision of such a court is extremely limited in the context presented by the instant case. Jurisdiction exists only to review a decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, Section 3(b)(3), Florida Constitution. *See Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Reaves v. State*, 485 So.2d 829 (Fla. 1986); *Paddock v. Chacko*, 553 So.2d 168 (Fla. 1989).

In effect, the intermediate courts of appeal control the Florida Supreme Court's jurisdiction by the manner in which they write their opinions; and because the court of appeal's decision failed to disclose the existence of either the Nicaraguan Supreme Court's advisory opinion or the Nicaraguan National Assembly's Interpretative Law (and, of course, because there was no Florida decision holding that moral damages are recoverable under Nicaraguan law), the plaintiffs were given not even a toehold upon which to support invocation of the Supreme Court's limited jurisdiction. Nevertheless, because of the Florida Supreme Court's decision in *The Florida Star v. B. J. F.*, 530 So.2d 286 (Fla. 1988), the plaintiffs were required to exhaust that potential remedy,

notwithstanding its futility, before petitioning this Court for certiorari review of the court of appeal's decision.

Shortly after the notices invoking the Florida Supreme Court's jurisdiction were filed, the Republic of Nicaragua, through its Attorney General, moved the Florida Supreme Court for leave to intervene to speak for the numerous Nicaraguan citizens deprived of their recoveries by the court of appeal's decision who were not parties to the proceeding, and to ask that its governmental institutions and laws be respected by the courts of Florida. This motion was denied, with leave to file an amicus brief on the merits only if the Court accepted the case for review. Predictably, however, the Florida Supreme Court determined that it had no jurisdiction to review the decision, and review was summarily denied (App. 10a-11a). This timely petition for writ of certiorari followed.

We understand that the Republic of Nicaragua will request leave to appear in this Court as an amicus curiae in support of the petition for writ of certiorari. And, as we noted at the outset, the Republic of Nicaragua has filed a formal protest with the government of the United States concerning the court of appeal's refusal to respect the due process rights of the numerous Nicaraguan citizens affected by its decision, as well as its obvious flouting of the settled principles of international comity, and requesting that the executive branch assist it in restoring its citizens' rights in this Court (App. 60a-63a).

REASONS FOR GRANTING THE WRIT

1. The petitioners' due process rights were plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as declared by an advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua.

This Court has frequently observed that a state court's misconstruction of the law of a foreign state violates the due process clause of the Fourteenth Amendment to the United States Constitution if the "misconstruction . . . contradict[s the] law of the other State that is clearly established and that has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988). *Accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).[4]

Although we could demonstrate that the court of appeal's decision plainly contradicts established Nicaraguan law with a detailed examination of the relevant provisions of the Nicaraguan Civil, Penal, Commercial and Procedural Codes, there would appear to be no need to trouble the Court with those details here, since

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[4] The fact that the numerous plaintiffs affected by the court of appeal's decision were citizens of Nicaragua (only some of whom resided in the United States), is of no moment; once Florida opened its courts to them for the adjudication of their claims, they (as well as the defendants) were clearly entitled, as all aliens are, to the protection of the due process clause. *See, e. g., Mathews v. Diaz*, 426 U.S. 67 (1976); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *United States v. Pink*, 315 U.S. 203 (1942).

the relevant provisions are explained with perfect consistency in the advisory opinion of the Nicaraguan Supreme Court and the Interpretative Law enacted by the Nicaraguan National Assembly.[5] For our limited purposes here, those authoritative declarations should be sufficient because this Court has also squarely held that an official declaration of foreign law, made by an institution of the foreign government having the power to interpret the existing law, "is conclusive" on courts of this nation when deciding a question of that foreign government's law. *United States v. Pink*, 315 U.S. 203, 220 (1942).[6]

That the court of appeal utterly flouted the authority of the Nicaraguan Supreme Court is undeniable – as a simple side-by-side comparison of the two opinions, quoted verbatim (and in English translation), plainly reveals:

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[5] We will, of course, detail the relevant code provisions in our brief on the merits, if the Court should agree to hear the case. In the meantime, the Court will find a detailed discussion of the relevant code provisions in the plaintiffs' motion for rehearing, which is included in the appendix at pages 25a-44a.

[6] Ironically, in *U.S. v. Pink*, the Court gave "conclusive" effect to a declaration of "The People's Commissariat for Justice" of the Soviet Union on a question of Soviet law involving the nationalization of assets within the United States. In the instant cases, the court of appeal simply ignored the declarations of all three branches of the newly-formed democratic government of a nation which had recently thrown off the shackles of Communism with the aid of the United States government. Surely, there are far better reasons for applying the rule of *Pink* to the instant cases than there were in *Pink* itself.

The Nicaraguan Supreme Court's Opinion

In Articles 2509 and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.

The court of appeal's opinion

No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]very one who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. [Civil] it mentions that in an accident involving public transportation, civil liability will always abide by the Criminal Code. Article 2 of the Criminal Code describes as punishable an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn. [Penal]). The Criminal Code of Nicaragua, in the Chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn. Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsible by virtue of a civil relationship binding

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. . . . Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

> him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12/21/1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberna deShon & Co., judgment date 12-9-1969.

Most respectfully, that the court of appeal read Nicaraguan law exactly contrary to the manner in which the Nicaraguan Supreme Court authoritatively stated it is simply beyond debate.

In ignoring the Nicaraguan Supreme Court's explanation of Nicaraguan law, the court of appeal apparently accepted the defendants' argument that the opinions of Nicaragua's highest judicial authority need not be respected because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. Whatever justification that argument might have provided evaporated, however, when, in quick response to the court of appeal's decision, the Nicaraguan National

Assembly enacted an Interpretative Law which was consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law.

The relevant portions of that "Authentic Interpretation," Law No. 157, read as follows (in English translation):

> Art. 1 The following is the authentic interpretation of Arts. 2509, 1837, 1838, 1865 and 3601 of the Civil Code, and paragraph 2 of Art. 1123 of the Code of Civil Procedure:
>
> a) civil responsibility for the damages and harms referred to in Art. 2509 C. and following (Title VIII, Sole Chapter on Crimes and Quasicrimes) is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages.
>
> If there were any doubt whatsoever, Art. 46 of the Penal Code of 1974, by providing the Rules to Determine Civil Responsibility, establishes " . . . indemnification for the material and moral damages" and, if there exists any other provision which may be contrary to this precept of the Penal Code, it was expressly or tacitly abrogated by the provisions of Art. 564 of the same Code.

Notwithstanding, a review of the current Nicaraguan legislation reflects that there is no express provision of the law which is contrary to indemnification for all damages, material or moral, arising from a crime or quasi-crime comprehended in the Penal Code or in the Civil Code.

. . . .

c) regarding Arts. 3106 C. and 1123 Pr., paragraph 2, as to cases for damages caused as a consequence of an accident involving a vehicle in public transportation, the carrier shall always be responsible, without exception, for the indemnification arising from the quasi-crime, as defined in Art. 10 Pn., which by its own terms produces only civil responsibility.

Consequently, from these provisions, in full coincidence with the terms of Art. 392 C.C., it must be concluded that civil responsibility of public transportation companies arising from a crime or quasi-crime is not extinguished by the acquittal of an agent from penal responsibility, nor even by the lack of a criminal prosecution when only civil responsibility is prosecuted.

This interpretation is also consistent with the provisions of Art. 52 Pn. which expressly addresses relinquishment of the criminal

> action to prosecute only the civil action "for the reparation of the damage caused["], in the same inclusive manner of Art. 2509 C., without specifying or excluding material or moral damages. Therefore, the civil action is not precluded in the case of an acquittal in a penal proceeding, or in the absence of a conviction which declares the criminal responsibility of the culpable party for such indemnification.

Most respectfully, that the court of appeal read Nicaraguan law exactly contrary to the manner in which the Nicaraguan National Assembly authoritatively stated it is simply beyond debate. And because the court of appeal's decision squarely contradicts the law clearly established by both of these plainly authoritative declarations, each of which was brought to the court's attention in a timely fashion and in no uncertain terms, it ought to be beyond debate here that the court of appeal plainly violated the petitioners' due process rights with its contradictory construction of Nicaraguan law.

There is far more involved here than the simple failure of justice in a case or two. The court of appeal's decision affected not merely the two petitioners here; it deprived *scores* of Nicaraguan citizens of substantial damage recoveries to which they were plainly entitled under Nicaraguan law in at least 34 different wrongful death actions. The reach of the decision therefore goes far beyond its four corners, and violates the due process rights of numerous persons who were not even parties to

the appeal in which they were deprived of those rights. The decision also provoked an angry response by the Nicaraguan government in the form of a formal diplomatic protest, and it may therefore imperil continuing friendly relations between the two governments at an exceedingly delicate point in their new relationship.

Surely, if an intermediate appellate court in Nicaragua had baldly flouted the authority of both this Court and Congress on a question of United States law, deprived scores of United States citizens of property rights to which they were plainly entitled under United States law, and provoked a diplomatic protest by the government of the United States, this Court would expect the Nicaraguan Supreme Court to review the decision and set the cases aright. Most respectfully, unless the due process clause is to amount to no more than an empty shibboleth in the instant cases, this Court should do no less.

2. The federal principle of comity known as the "act of state doctrine" was plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as declared with respect to the instant litigation by an advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua.

We also respectfully submit that the federal principle of comity known as the "act of state doctrine" was plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as explicitly declared with respect to the instant litigation by an advisory opinion of the Supreme

Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua. The act of state doctrine derives from " 'the highest considerations of international comity and expediency,' " and has been faithfully applied by this Court over the decades because of " 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 404 (1990), *quoting Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

The classic statement of the doctrine is this: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Banco Nacional de Cuba, supra* at 416, *quoting Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine " 'requires . . . that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision[,]' " because " '[t]o permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' ' " *Banco Nacional de Cuba, supra* at 417-18, *quoting Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918), and *Underhill, supra* at 303-04.

And while the doctrine has most frequently been applied where the title to property is at stake, its reach is far broader:

> An act of state has been said to be any governmental act in which the sovereign's interest qua sovereign is involved. "The expression 'act of State' usually denotes 'an executive or administrative exercise of sovereign power by an independent State or potentate, or by its or his duly authorized agents or officers.' The expression, however, is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior Court." Mann, The Sacrosanctity of the Foreign Act of State, 59 LQ Rev 42 (1943).

Banco Nacional de Cuba, supra at 445 n. 3 (J. White, dissenting).

A similar principle is also inherent in the rule of *United States v. Pink*, 315 U.S. 203, 220 (1942), upon which we have previously relied, which holds that an official declaration of foreign law, made by an institution of the foreign government having the power to interpret the existing law, "is conclusive" on courts of this nation when deciding a question of that foreign government's law. It is also settled that a state court's violation of the act of state doctrine presents a federal question which is reviewable by certiorari in this Court. *Banco Nacional de Cuba, supra* at 424-27.

While the doctrine was not explicitly invoked by its technical appellation below, reliance upon the doctrine was clearly implicit in the plaintiffs' brief, in which we

insisted that the advisory opinion of the Nicaraguan Supreme Court was conclusive of the legal question before the court. Thereafter, when the court of appeal ruled against the plaintiffs on the moral damages issue for the very first time in the litigation, and the National Assembly of Nicaragua responded immediately by enacting the Interpretative Law insisted upon by the defendants, the general principles of comity (of which the act of state doctrine is simply a particular expression) were explicitly invoked in our motions for rehearing and rehearing en banc, where we argued at length that the authoritative act of the National Assembly simply had to be respected and followed by the court of appeal. Moreover, the doctrine clearly has its roots in the due process clause, which was explicitly invoked at every stage of the proceeding by all parties below.

We therefore believe that the federal question presented by the court of appeal's studied refusal to afford any respect whatsoever to these authoritative acts of the government of Nicaragua, made in connection with the very cases presently before the Court, was fairly preserved for review here. And because our demonstration of the court of appeal's violation of the due process clause ought to be sufficient to demonstrate that the court of appeal plainly violated the principle of comity known as the act of state doctrine as well, there should be no need for us to make a separate demonstration of that additional, obvious violation of federal law here. The importance of the issue should also be sufficiently obvious as to require no reiteration here. We respectfully request an opportunity to brief the court of appeal's violation of both aspects of federal law on the merits.

CONCLUSION

For all of these reasons, it is respectfully urged that a writ of certiorari should issue to review the decision and judgment of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

JOEL D. EATON, ESQ.
(Counsel of Record)

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1993

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,	**	CASE NOS. 92-925 92-1408
Appellants,	**	
vs.	**	
TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors, and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.	**	
Appellees.	**	

Opinion filed March 9, 1993.

Appeals from the Circuit Court for Dade County, Ronald M. Friedman, Judge.

Condon & Forsyth and Desmond T. Barry, Jr. and Marilyn P. O'Mara (New York); Steel Hector & Davis and Thomas Scott and Adalberto Jordan; Thornton, David, Murray, Richard & Davis and John M. Murray, for Appellants.

Speiser, Krause, Madole & Mendelsohn, Mata (Texas); Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel D. Eaton, for Appellees.

Before SCHWARTZ, C.J., and FERGUSON and LEVY, JJ.

FERGUSON, Judge.

Transportes Aereos Nacionales, S.A., and Servicio Aereo de Honduras (collectively TAN-SAHSA), the defendants in two wrongful death actions, appeal from judgments awarding moral damages for non-economic harm.

In October 1989, a Boeing 727 operated by TAN-SAHSA crashed in Tegucigalpa, Honduras causing the death of 127 passengers and four crew members. The captain and first officer of the craft survived the accident. They were acquitted of criminal charges filed by Honduran authorities.[1] Subsequently, thirty-four wrongful death actions were filed against TAN-SAHSA in the circuit court for Dade County. For pre-trial purposes, the

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[1] According to the appellants, in Latin America the police routinely arrest and file criminal charges against persons involved in fatal accidents. Such charges, however, rarely result in convictions and sentences. *See* K. Karst, *Latin American Legal Institutions: Problems for Comparative Study* 256, 260-261 (1966) (discussion on the conviction rate in the criminal tribunal for homicide or negligently caused injuries).

trial court consolidated thirty-one of the thirty-four cases. The parties stipulated that the actions were governed by Nicaraguan law and that TAN-SAHSA would not contest liability for compensatory damages recoverable under Nicaraguan law. The only question in dispute was whether Nicaraguan law permits the recovery of moral damages in a wrongful death case.

Following an evidentiary hearing, the court ruled that both economic and moral damages could be claimed by the decedents' family members. In the *Brenes* action, the parties stipulated to $1,000,000 in compensatory damages and, if the trial court's interpretation of moral damages was affirmed on appeal, $1,500,000 in moral damages. In the *Crow* case, the jury awarded economic damages of $144,000 and moral damages of $1,494,000.

Standard of Review

A trial court's determination of foreign law is treated as a ruling on a question of law over which an appellate court exercises plenary review. *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955). *See also Aboandandolo v. Vonella*, 88 So. 2d 282 (1956); C.T. Drechsler, Annotation, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2d 1437, 1439 (1952) (determination of foreign law is a question of law under Uniform Act, changing common law which considered it an issue of fact).

Under section 90.202(4), Florida Statutes (1991), a court may take judicial notice of foreign law. The Law Revision Council Note to that section states that a Florida court complies with section 90.202 by taking judicial notice in a manner similar to that made under the federal

rules. The note then quotes Federal Rule of Civil Procedure 44.1, which provides that a court's determination of foreign law "shall be treated as a ruling on a question of law." Moreover, in reviewing, de novo, the trial court's determination, appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law. *See* § 90.204(2), Fla. Stat. (1991); *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1192 (7th Cir. 1985) ("trial and appellate courts are urged to research and analyze foreign law independently.")[2]

Nicaraguan Law

Nicaragua is a civil-law jurisdiction. It is axiomatic that in civil-law jurisdictions, lawmaking is exclusively the function of the legislature. *See, e.g.*, John Henry Merryman, *The Civil Law Tradition* 23-24 (1969) (only the legislature can make law); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673 (1970) (the basis of all law is legislative). Statutes, enacted by the legislature, are the primary recognized source of law in civil-law tradition. Wilson, *Criminal Justice in Revolutionary Nicaragua*, 23 Miami Inter-American L.Rev. 269, 281-82 (1992) ("The study of civil law is the study of codes. No

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[2] *Guelman v. De Guelman*, 453 So. 2d 1159 (Fla. 3d DCA 1984), relied upon by the appellees for the proposition that an interpretation of foreign law is an issue of fact, is neither a correct statement of the law nor applicable to the question presented in this case. In *Guelman* the correct interpretation to be given the foreign law was litigated as a question of fact. Here, the court was requested, before trial, to take judicial notice of, and to apply the Nicaraguan Code, as a matter of law.

other source of law – judicial decisions, treatises, regulations, custom, or practice – carries the central significance of the code as the correct, organized, coordinated, unified expression of governing principles.").

Consistent with this principle of legislative supremacy, Nicaraguan law provides that all rights, duties, and liabilities must be expressly created by the legislature. Article 1835 of the Civil Code of Nicaragua states: "The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the Special laws. . . . " Accordingly, moral damages cannot be awarded in a wrongful death case under Nicaraguan law unless such damages are expressly authorized by the legislature.

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]veryone who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss. In fact, the only civil-code definition of "injury" and "harm" is found

in Article 1865 which states "[i]ndemnification of damages includes not only the amount of the loss which has been suffered, but also that of the creditor's loss of profits. . . . "

Furthermore, the legislative history of Article 2509 suggests that at the time of its enactment, the legislature did not intend to provide for an award of moral damages. The historical note to Article 2509 states that the provision was derived from the Civil Code of Costa Rica, a jurisdiction that did not recognize moral damages. A. Brenes Cordoba, *Tratado De Los Obligaciones* 79 (1977 reprint of 1923 ed.). Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

In view of our holding that no provision of Nicaraguan law permits the recovery of moral damages in these wrongful death cases, those portions of the judgments entered in *Brenes* and *Crow* that award moral damages cannot stand.

Reversed and remanded.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1993

NOVEMBER 3, 1993

TRANSPORTES AEREOS NACIONALES, S.A., etc., et al.,	**	
Appellants,	**	CASE NO.
vs.	**	92-925
	**	92-1408
TANIA FLORES DE BRENES, etc., et al.,	**	
	**	
Appellees.	**	

Upon consideration, appellees' motion for rehearing and Claudia Crow's joinder in motion for rehearing are hereby denied. Schwartz, C.J., and Ferguson and Levy, JJ., concur. Appellees' motion for rehearing en banc and Claudia Crow's joinder in motion for rehearing en banc are denied. Schwartz, C.J., and Hubbart, Nesbitt, Baskin, Ferguson, Jorgenson, Levy, Gersten and Goderich, JJ., concur. Cope, J., dissents. Barkdull, J. is recused.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Illegible
Deputy Clerk

(SEAL)

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

NOVEMBER 5, 1993

TRANSPORTES AEREOS NACIONALES, S.A., etc., et al.,	**	
Appellants,	**	CASE NO.
vs.	**	92-925
	**	92-1408
TANIA FLORES DE BRENES, etc., et al.,	**	
	**	
Appellees.	**	

Upon consideration, appellees' motion for certification and Claudia Crow's joinder in motion for certification are hereby denied. Schwartz, C.J., and Ferguson and Levy, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Illegible
Deputy Clerk

(SEAL)

SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 11, 1994

TANIA FLORES deBRENES, ETC.,	*	CASE NO. 82,837
Petitioner,	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 92-925 92-1408
v.	*	
TRANSPORTES AEREOS NACIONALES, S.A., ETC., ET AL.,	*	
Respondents.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Sid J. White (SEAL)
Clerk, Supreme Court

SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 11, 1994

CLAUDIA CROW, ETC., ET AL.,	*	CASE NO. 82,831
Petitioner,	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 92-925 92-1408
v.	*	
TRANSPORTES AEREOS NACIONALES, S.A., ETC., ET AL.,	*	
Respondents.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Sid J. White (SEAL)
Clerk, Supreme Court

[Coat of arms]

SUPREME COURT OF JUSTICE

CERTIFICATE

The undersigned Secretary of the Honorable Supreme Court of Justice hereby certifies the inquiry included herein and says verbatim the following:

Managua, October 5, 1992. Doctor German Vasquez C., Chief Judge of the Criminal Court. Managua. Dear Judge Vasquez.

In a letter dated 08-20-92, you mention the following: That if under Nicaraguan laws only property damages apply to bring suit, or if moral damages also, according to Article 46 of the Penal Code. And if to the effect of determining who may claim indemnization for determined damages, it corresponds to the legal dependents of the defendant, according to the Civil Code, pursuant to the precepts in Article 48 of the Penal Code and Article 288 of the Civil Code."

I have received instructions from the Judges of the Supreme Court of Justice to answer in the following manner:

In Articles 2509, and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment

date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. it mentions that in an accident involving public transportation, civil liability will always abide by the Criminal Code.

Article 2 of the Criminal Code describes as punishable, an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn).

The Criminal Code of Nicaragua, in the chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn.

Article 10 Pn indicates that a damaging act or omission of an agent for whose actions a person is responsible, by virtue of a civil relationship binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12-21-1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberena Deshon & Co., judgment date 12-9-1969.

This is in reply to your inquiry. ALFONSO VALLE PASTORA. SECRETARY. SUPREME COURT OF JUSTICE.

Let it also be recorded that the judgment issued by the Supreme Court of Justice, in this case, does not contain an adversary vote because the inquiry was disposed of by unanimous vote of all the Magistrates, Judges Orlando Corrales Mejía, Rafael Chamorro Mora, Ramón Romero Alonso, Alba Luz Ramos Vanegas, Rodrigo Reyes Portocarrero, Enrique Villagra Morales, Santiago Rivas Haslam, Adrían Valdivia Rodríguez.

By request of Doctor Alvaro Ramirez González, this was issued in the city of Managua, on the ninth day of December, nineteen hundred and ninety-two.

/Validated Rubber Stamp of Supreme Court/
ALFONSO VALLE PASTORA
SECRETARY
SUPREME COURT OF JUSTICE

MINISTRY OF FOREIGN AFFAIRS

CONSULAR DIVISION

The Ministry of Foreign Affairs of the Republic of Nicaragua hereby "CERTIFIES" that the preceding signature which says : ILLEGIBLE . ALFONSO VALLE PASTORA.

Is "GENUINE" and corresponds to the one used on this date by the SECRETARY OF THE SUPREME COURT OF JUSTICE IN NICARAGUA.

This Ministry shall not assume any liability as to the contents of the document.

Managua, December 10, 1992

/Rubber Stamp of Ministry of Foreign Affairs – Managua – Nicaragua/

/s/ illegible signature

Bergman Zúniga Pérez
Sub-Director Consular

NATIONAL ASSEMBLY

LAW No. 157

THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NICARAGUA

In exercise of its powers

HAS DICTATED

The following:

AUTHENTIC INTERPRETATION OF

ARTICLES 2509, 1837, 1838, 1865, AND 3106 OF THE CIVIL CODE AND ARTICLE 1123(2) OF THE CODE OF CIVIL PROCEDURE

Art. 1 The following is the authentic interpretation of Arts. 2509, 1837, 1838, 1865 and 3601 of the Civil Code, and paragraph 2 of Art. 1123 of the Code of Civil Procedure:

a) civil responsibility for the damages and harms referred to in Art. 2509 C. and following (Title VIII, Sole Chapter on Crimes and Quasi-crimes) is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages.

If there were any doubt whatsoever, Art. 46 of the Penal Code of 1974, by providing the Rules to Determine Civil Responsibility, establishes " . . . indemnification for the material and moral damages" and, if there exists any other provision which may be contrary to this precept of the Penal Code, it was expressly or tacitly abrogated by the provisions of Art. 564 of the same Code.

Notwithstanding, a review of the current Nicaraguan legislation reflects that there is no express provision of the law which is contrary to indemnification for all damages, material or moral, arising from a crime or quasi-crime comprehended in the Penal Code or in the Civil Code.

b) the provision of Art. 1865 C. is not applicable to " . . . civil obligations arising from crimes or faults, which shall be governed by the provisions of the Penal Code", as established by Art. 1837 C., and neither is it applicable to the obligations arising from "acts or omissions involving guilt or negligence not punished by the law . . . ", which are subject to the provisions of Title VIII, Sole Chapter, as provided in Art. 1838 C.

Art. 1865 C. is applicable only to obligations arising from other types of contractual acts, debts or matters related to property.

c) regarding Arts. 3106 C. and 1123 Pr., paragraph 2, as to cases for damages caused as a consequence of an accident involving a vehicle in public transportation, the carrier shall always be responsible, without exception, for the indemnification arising from the quasi-crime, as defined in Art. 10 Pn., which by its own terms produces only civil responsibility.

Consequently, from these provisions, in full coincidence with the terms of Art. 392 C.C., it must be concluded that civil responsibility of public transportation companies arising

from a crime or quasi-crime is not extinguished by the acquittal of an agent from penal responsibility, nor even by the lack of a criminal prosecution when only civil responsibility is prosecuted.

This interpretation is also consistent with the provisions of Art. 52 Pn. which expressly addresses relinquishment of the criminal action to prosecute only the civil action "for the reparation of the damage caused["], in the same inclusive manner of Art. 2509 C., without specifying or excluding material or moral damages. Therefore, the civil action is not precluded in the case of an acquittal in a penal proceeding, or in the absence of a conviction which declares the criminal responsibility of the culpable party for such indemnification.

ch) according to Arts. 46 and 48 Pn., the persons legitimately entitled to claim material and moral damages are the persons with the right to claim support according to the pertinent provisions of the Civil Code and its amendments, whatever the case may be.

Art. 2 The present law shall enter in force from its publication by any means of mass communication, without prejudice to its publication in the Official Daily, The Gazette. So it be published.

Issued in the City of Managua in the Hall of Sessions of the National Assembly, on the twenty-third day of March of nineteen hundred and ninety three.

GUSTAVO TABLADA ZELAYA
PRESIDENT OF THE
NATIONAL ASSEMBLY (Seal)

FRANCISCO J. DUARTE
SECRETARY OF THE
NATIONAL ASSEMBLY
(Seal)

With three valid pages in conformity with its original, which were duly compared with it. Managua on the twenty third day of March of nineteen ninety three.

FRANCISCO J. DUARTE TAPIA
SECRETARY OF THE
NATIONAL ASSEMBLY
(Seal)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 92-01408; 92-00925

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S. A., a foreign corporation,

Appellants,

vs.

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.,

Appellees.

_____/

MOTION FOR REHEARING

The appellees in case no. 92-00925, Tania Flores de Brenes, etc., et al., plaintiffs below, move the Court for

rehearing in this cause. As grounds therefor they would briefly and respectfully show:

Most respectfully, the Court reached the wrong result in this case, for several reasons. First and foremost, at the time that it decided the case, the Court did not have the benefit of an "official interpretation" of the law by the National Assembly of Nicaragua. That interpretation now exists, and it requires a different result. On March 24, 1993, in response to the panel's opinion in this case, the Nicaraguan National Assembly – which the defendants insisted was the only branch of the Nicaraguan government which had the constitutional authority to "officially interpret the law" – issued an official Resolution declaring that the law of Nicaragua *does* provide for the recovery of moral damages in cases like this one. For this reason, as well as the additional reasons which follow, the Court's opinion simply cannot stand as the last word on the subject. Second, the panel had no authority to overrule *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984), as it did. Third, the Court misapprehended the nature and scope of the Nicaraguan Penal Code, as well as its meaning and applicability to this case. And fourth, the Court overlooked several things, including four provisions of the Nicaraguan Civil Code and Code of Civil Procedure which provided an explicit (and contrary) answer to the question presented in this case. Because of the tenor of the Chief Judge's questions and comments at oral argument, we recognize that we may have some difficulty in convincing the Court of its error. We do believe that the Court desires a correct result in this case, however, so all that we ask is a fair opportunity to make our points. We will be as brief as possible.

A. The intra-district conflict.

In deciding that *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984), "is *neither a correct statement of the law* nor applicable to the question presented in this case" (slip opinion, p. 4, n. 2; emphasis supplied), the panel undeniably overruled a decision of a prior panel of this Court. As we explain in more detail in our motion for rehearing en banc, this panel had no authority to do that; only the en banc Court can do such a thing. In the interest of brevity, we will not reargue the point. Instead, the panel is referred to our motion for rehearing en banc, which we adopt and incorporate (in its entirety) here by reference. We respectfully submit that, at minimum, the panel should refer its open disagreement with *Guelman* to the en banc Court for rehearing of its decision.

B. The Nicaraguan National Assembly's Resolution.

Next, as the Court is certainly aware, it chose to give no weight whatsoever to the Nicaraguan Supreme Court's recent advisory opinion (or "consulta," as the defendants prefer to call it) on the subject, which is at odds with the panel's opinion in every particular. (To demonstrate that the two opinions are antithetical in every particular, we have set out their relevant portions side-by-side for comparison in a separate document which is attached to this motion.) Because the panel did not bother to explain why it chose to ignore the Nicaraguan Supreme Court's opinion, and because we are unwilling to assume that the panel felt it was more competent to decide the substance of the law of Nicaragua than that nation's highest Court, we can only

assume that the panel accepted one or both of the arguments which the defendants advanced in their reply brief in an effort to finesse the Supreme Court's opinion. We explain in our motion for rehearing en banc why the defendants' reliance upon the 1961 "consulta" of the Supreme Court provided no justification for ignoring the 1992 advisory opinion, and because we have incorporated that motion by reference here, we will not belabor the point. We also doubt that this was the reason why the panel declined to credit the opinion of the Nicaraguan Supreme Court in any event, so we will concentrate instead on the second ground which the defendants advanced in avoidance of the opinion.

According to the defendants, the Supreme Court's advisory opinion could legitimately be ignored here because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. Given the Chief Judge's comment at oral argument that this constitutional provision rendered the Nicaraguan Supreme Court an essentially meaningless institution where "interpretation" of Nicaraguan law is concerned, it is likely, we think, that the advisory opinion was ignored for this reason, and this reason alone. But whatever justification this constitutional provision may have supplied for the panel's determination to ignore the advisory opinion, most respectfully, that justification no longer exists. On the day that we were required to file this motion, and in response to the panel's opinion in this case, the National Assembly of Nicaragua issued an official Resolution declaring that the law of Nicaragua is correctly stated in the Supreme

Court's recent advisory opinion – and thus, that the interpretation of Nicaraguan law contained in the panel's opinion is wrong.[1]

The defendants cannot have it both ways here. They cannot ask the Court to ignore the Supreme Court's declaration of Nicaraguan law on the ground that only the National Assembly can interpret the law under Nicaragua's Constitution, and then ask the Court to ignore the National Assembly's official interpretation of the law as well, when that constitutionally permissible interpretation proves adverse to their position. Neither can the defendants escape this recent official interpretation of Nicaraguan law by resorting to the shibboleth that new matters cannot be raised for the first time in a motion for rehearing. Everything contained in the Resolution was argued in our appellees' brief in one form or another. And because the defendants have insisted (with apparent success) that opinions of the Nicaraguan Supreme Court are meaningless because only the Nicaraguan National Assembly can officially interpret the law, the Resolution issued less than 24 hours ago clearly must be treated in the same manner as the Court would treat an intervening decision of the Florida Supreme Court or United States Supreme Court while a motion for

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[1] Because this Resolution was issued on the last day available for filing this motion, only a "fax" copy of it is available for filing at the present time. A "fax" copy is therefore attached hereto. We will supplement this motion with a fully authenticated document and an appropriate English translation of it as soon as we possibly can. Pursuant to §§ 90.202 and 90.203, Fla. Stat. (1991), we respectfully request that the Court take judicial notice of the authenticated document when it is received.

rehearing is pending. In that circumstance, of course, rehearing is routinely granted to ensure that the final decision of the court conforms to the law announced in the intervening decision.[2]

In addition, now that the Court has ruled that the determination of foreign law presents a pure question of law, and that "appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law" (slip opinion, p. 3), we do not see how the Court could legitimately ignore the Resolution of the National Assembly simply because it was issued a few days after the Court filed its now demonstrably erroneous opinion. Most respectfully, whatever justification there may have been for ignoring the Nicaraguan Supreme Court's advisory opinion on the subject, there can be no justification whatsoever for ignoring the Nicaraguan National Assembly's more recent Resolution on the subject – and we respectfully submit that the doctrine of comity (upon which we elaborate in our motion for rehearing en banc) simply requires the Court to follow the law announced in that recent Resolution.

C. Article 2509 of the Civil Code.

We turn now to the things which the Court misapprehended and overlooked in reaching its decision. First, we

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[2] *E.g., Hampton v. A. Duda & Sons, Inc.*, 511 So.2d 1104 (Fla. 5th DCA 1987). *See State v. Hospital District of Hardee County*, 201 So.2d 69 (Fla. 1967); *Jollie v. State*, 405 So.2d 418 (Fla. 1981). *Cf. Regan v. ITT Industrial Credit Co.*, 469 So.2d 1387 (Fla. 1st DCA 1984), *approved*, 487 So.2d 1047 (Fla. 1986).

will address the Court's "construction" of the phrase "repair it along with the harms" (or "redress it, with damages," in the plaintiffs' translation) in Article 2509 of the Nicaraguan Civil Code. The Court offered two reasons for interpreting this phrase narrowly, to include only pecuniary damages and to exclude moral damages. First, it purported to find an apparent compulsion for such a narrow construction in Article 1865 of the Nicaraguan Civil Code, which states "[i]ndemnification of damages includes not only the amount of the loss which has been suffered, but also that of the creditor's loss of profits. . . . "

Quite apart from the fact that the phrase "the amount of the loss" is no less general and all-embracing than the general phrase "repair it along with the harms," the Court overlooked the fact that Article 1865 has no applicability whatsoever to actions to recover damages for personal injuries and wrongful deaths caused by quasi-crimes, like the negligence action in issue here. Most respectfully, each and every Article in the Chapter of the Civil Code from which the Court extracted Article 1865 – from Article 1845 to 1866 – deals with claims for damages to property rights and for the recovery of debts; all of the historical notes accompanying these Articles refer to property rights and debts; and there is no reference in any of these notes to Article 2509. As a result, Article 1865 of the Civil Code should have been deemed simply irrelevant to the meaning of Article 2509.

The irrelevancy of Article 1865 to Article 2509 can be demonstrated in another way. In the Chapter preceding the Chapter in which Article 1865 appears, Article 1837 expressly states that civil obligations arising from punishable acts are regulated by the provisions of the Penal

Code, and Article 1838 expressly states that civil obligations arising from guilt or negligence not otherwise punishable by the law are regulated by the Chapter in the Civil Code governing crimes and quasi-crimes – the Chapter which includes Article 2509. Most respectfully, Artice 1865 deals with property rights and debts; it simply has no relevance to the issue presented in this appeal.

The Court also attempted to justify its narrow construction of Article 2509 by suggesting that, because it "was derived from [Article 1045 of] the Civil Code of Costa Rica, a jurisdiction that did not recognize moral damages" (slip opinion, p. 6), the Nicaraguan National Assembly must have meant Article 2509 to be limited to pecuniary damages. Most respectfully, the Court simply accepted the defendants' version of Costa Rican law on this point (which was based exclusively on a 1923 treatise, which was also the sole authority cited by the Court), and it overlooked Costa Rican law in the process.[3] The more modern view, adopted by the appellate courts

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[3] Curiously, the portion of the 1923 treatise on which the Court relied says nothing specific about Article 1045 of the Civil Code of Costa Rica. Moreover, the single sentence of it which the defendants bothered to translate for the Court (at A. 77) offers only the author's apparent opinion that "[i]ndemnification should compensate nothing more than patrimonial losses . . . because affection in not a thing that is in the commerce of men." Most respectfully, that 70 year-old statement of opinion by a single Costa Rican treatise writer is an *awfully* slender reed upon which to determine what the Nicaraguan National Assembly intended when it enacted Article 2509 – and frankly, we think our clients deserved a better explanation than this for the Court's determination to ignore the Nicaraguan Supreme Court's contrary opinion on the point.

of Costa Rica and touted by current commentators, is that Article 1045 of the Civil Code of Costa Rica (which has not changed since its enactment) *does* provide for the recovery of moral damages, even in civil cases not otherwise covered by the penal code. *See* Rosa Maria Abdelnour Granados, *La Responsabilidad Civil Derivada del Hecho Punible [The Civil Responsibility Arising from the Punishable Act]*, pp. 330-53 (1984).[4] For the convenience of the Court, a copy of the relevant pages from this treatise, together with an English translation of them, is provided in a separate appendix to this motion. Most respectfully, if the meaning of Article 2509 of the Civil Code of Nicaragua is to turn upon the meaning of Article 1045 of the Civil Code of Costa Rica, then the Court reached the wrong conclusion in this case.

D. Article 46 of the Penal Code.

We turn now to the Court's refusal to give effect to Article 46 of the Nicaraguan Penal Code, which is contained in Chapter VI of the Penal Code, entitled "Regulations to Determine Civil Liability," and which plainly and

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[4] The author is a Professor of the Free School of Law of the Autonomous University of Central America and of the School of Law of the University of Costa Rica. The treatise also observes that Article 1045 of the Costa Rican Civil Code (and therefore Article 2509 of the Nicaraguan Civil Code) derives from Article 1382 of the French Code of Napoleon, and that moral damages are recoverable in France under this provision. The treatise also explains that the view of Mr. Alberto Brenes Cordoba, upon which the Court relied, is no longer the accepted view in Costa Rica.

unambiguously provides for the recovery of both pecuniary and moral damages. If we read the Court's opinion correctly, it appears that the Court concluded that all civil actions to recover compensatory damages are ordinarily governed exclusively by the Civil Code, and that the civil liability provisions of the Penal Code are applicable only in cases in which a person has been convicted of a crime – that the moral damages authorized by Article 46 are in the nature of a punishment for a criminal offense, rather than compensation for the damages suffered by the victim of a crime or quasi-crime.

That is what the defendants argued here, of course, yet they failed to point the Court to a single word in any Nicaraguan Code which even arguably says such a thing. They also failed to acknowledge their own expert's admission at trial that, apart from Article 46 itself (which says no such thing), there is not a single piece of paper in Nicaragua which says such a thing (T. 181-83).[5] The *only* place in which such a version of Nicaraguan law appears

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[5] Despite their expert's concession to the contrary, the defendants attempted to construct such a provision here by quoting half a sentence contained in Article 52 of the Penal Code. As we demonstrated in our answer brief (at pages 32-33), however, the remainder of the sentence allows resort to a civil forum where the victim waives participation in a criminal proceeding. In any event, Article 52, on its face, says only that civil damages are recoverable from a convicted criminal defendant, and that requests for such damages should be made in a subsequent civil action, rather than in the criminal action; it contains no affirmative prohibition against the recovery of damages in a civil action where there has been no criminal conviction – and it therefore adds nothing to the defendant's expert's position (which is probably why he never mentioned it below).

is in the defendants' brief – and, most respectfully, in accepting that version uncritically here (despite its insistence upon bottoming the law of Nicaragua exclusively on the express language of its Codes), the Court has misapprehended the nature and scope of the Nicaraguan Penal Code, as well as its meaning and applicability to this case.

As we tried to explain to the Court in our answer brief, the Nicaraguan Penal Code is not exclusively a criminal code. It does govern crimes, to be sure, but it also governs quasi-crimes (or torts), and it governs civil actions to recover damages caused by both criminal and quasi-criminal conduct. And if the instant suit had been brought in Nicaragua, it would clearly have been governed by the Penal Code. It would have been governed by the Penal Code because, as we explained at pages 29-30 of our brief, Articles 3105 and 3106 of the Civil Code expressly provide that the owner of a common carrier is absolved of criminal sanctions for its employees' "infractions of laws" (or fiscal or police regulations), unless it is proven that the owner participated in the infraction; but the owner is *"always"* liable to pay "damages in conformance with the prescriptions of the Criminal Code." Therefore, with respect to the civil liability of a common carrier for damages arising out of "infractions of laws," the Penal Code is the governing Code. In their reply brief, the defendants attempted to avoid these provisions by arguing that, because of the "import" of Articles 3097 and 3098, Articles 3105 and 3106 do not apply to any common carrier which has a "permanent place of business." Most respectfully, this effort to finesse Articles 3105 and 3106 should have been

rejected out of hand here, because (as we noted at p. 30, fn. 16, of our brief, and as the Nicaraguan National Assembly explains in its recent Resolution) the General Law of Transportation of 1986 – specifically, Article 392 of the Nicaraguan Commercial Code – extended to all aviation companies, including the defendants, all of the pre-existing code provisions regulating mass transportation, including Articles 3105 and 3106. The defendants cannot contend to the contrary here, because their own expert *agreed* with the plaintiffs' expert on this point at trial (T. 191-92, 234-35).

The "law" which the defendants' agents violated in these cases – which is the "law" triggering Articles 3105 and 3106 – is Article 329 of the Penal Code, which makes it a punishable act to cause a transportation accident through "carelessness or negligence." This is a criminal provision for which the owner cannot be punished criminally (because of Articles 3105 and 3106), but it establishes the nature of the punishable act which gives rise to civil quasi-crime (or tort) liability under Article 10 of the Penal Code, which reads as follows:

> A quasicrime is established by the action or damaging omission by an agent of whose actions a person is liable by virtue of the civil relation between him and said agent, as determined by the law. Quasicrimes only result in civil liability.

In other words, when an agent commits a punishable act (like a violation of Article 329), the liability of the principal lies in tort under the Penal Code (which is also essentially what Article 3106 of the Civil Code says).

The defendants do not really dispute that their liability for damages as principals of their negligent agents would ordinarily lie under the Penal Code. What they have argued (and what the Court held) is that the acquittal of their agents in Honduras relieved them as principals of their obligation to pay either pecuniary damages or moral damages under Article 46 of the Penal Code, and remitted the plaintiffs to the purportedly more limited pecuniary damages provided by Article 2509 of the Civil Code. In making this argument, however, the defendants have pointed to no explicit provision in any Nicaraguan Code which says such a thing. In point of fact, however, there are four explicit provisions in the Nicaraguan Codes which deal with this subject – all of which, we respectfully submit, the Court overlooked in accepting the version of Nicaraguan law which the defendants created in their brief. It would appear that the Court overlooked them because we did not quote them in our brief. What we did instead was to quote selected discussions of the point from three decisions of the Nicaraguan Supreme Court which analyzed the provisions in detail, and then referred the Court to the remainder of the decisions for the details themselves. Apparently because of its conclusion that decisions of the Nicaraguan Supreme Court have no precedential value, the Court did not undertake that task. Before it allows its decision to become final, however, it simply must examine the pertinent provisions themselves.

The effect of *both* convictions *and* acquittals in criminal proceedings upon subsequent civil suits for damages is explicitly addressed in Title VI of the Nicaraguan Civil

Code, in the Chapter entitled "On Res Judicata," in Articles 2362 and 2363. In effect, these Articles say that verdicts in criminal cases, both convictions and acquittals, are to be given res judicata effect in subsequent civil actions brought *against the person tried for the crime*, in which redress is sought for damages caused by *the crime*, only in three enumerated particulars – and in no others:

> **Art. 2362.** The verdicts pronounced by courts of penal justice enjoy the authority of res judicata, in favor or against any person, indistinctively, and in an absolute manner, when such verdicts decide:
>
> 1. If the accused or indicted party who is charged for an act which constitutes an infraction of the criminal law, is or is not the perpetrator of such act.
>
> 2. If those acts are chargeable from a penal law point of view.
>
> 3. If such acts present the required characteristics for the application of one or another provision of such law.
>
> **Art. 2363.** The other resolutions of a verdict pronounced by a court of criminal justice, which are not comprehended in any of the three cases of the preceding article, shall not have the effect of res judicata before a civil court, unless the party affected participated in the criminal trial.

It is Article 2363 which explicitly rejects the conclusion reached by the Court in this case, so it bears rereading before proceeding.

The subject is also addressed in two Articles of the Code of Civil Procedure:[6]

> **Art. 1122.** In civil trials the verdicts rendered in criminal proceedings can be applied, if the defendant is convicted.
>
> **Art. 1123.** The verdicts which dismiss the charges or which order the final acquittal shall produce res judicata effect in civil matters, only if based on any of the following circumstances:
>
> 1. The existence or non-existence of the crime or quasi-crime that has been the subject matter of the proceedings. Cases in which the dismissal or the acquittal is based on the existence of exculpatory circumstances which excuse criminal responsibility are not comprehended under this paragraph.
>
> 2. The non-existence of any relation whatsoever between the person charged and the act which is being prosecuted, *without prejudice to the civil responsibility which may affect him for the acts of third parties or for damages resulting from accidents according to the provisions of the Civil Code;* and
>
> 3. The non-existence in the record of any indicia against the accused party, *in which case res judicata cannot be alleged except with respect to persons who participated in the criminal proceeding as principal or adjoining parties.*
>
> The dismissal or acquittal decisions in criminal matters relating to the guardians, executors,

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[6] The defendants quoted the first of these provisions in their reply brief (at p. 10, n. 10). The reason why the Court was not alerted to the second will become clear as we proceed.

> depositaries, treasurers, and other persons who have received valuables of movable property under any title that involves the obligation to return shall not produce any res judicata effects.

(Emphasis supplied).

Most respectfully, no res judicata effect of any sort arises from these provisions in the instant case because the defendants' agents were not acquitted of the crime of negligence by a Nicaraguan criminal court; they were acquitted only of culpable homicide, and then only by a Honduran court. And even if the defendants' agents had been acquitted of the *crime* of negligence by a Nicaraguan court, these provisions would provide no res judicata effect in a subsequent civil action against the *defendants* to redress the *quasi-crime* arising from the "punishable act" of negligence, because in Nicaragua, as in Florida, the defense of res judicata requires an identity of the cause of action. The point is discussed at length, in an analysis which is bottomed squarely upon the four Code provisions quoted above, in *Carazo Olivier v. Texaco Caribbean, Inc.*, April 2, 1968, Corte Suprema de Justicia, Nicar., Bol. Jud. 56 (A. 192; S.A. 51).[7] In that case, the Supreme Court *reversed* an intermediate appellate court which had agreed with the position asserted by the defendants here; held that an automobile driver's acquittal in a criminal action did not preclude the plaintiff from recovering against him in a corresponding civil, quasi-criminal (or tort) action;

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[7] Even if the Court should continue to consider the decisions of the Nicaraguan Supreme Court as unauthoritative on points of legal interpretation, it should at least read what that Court has had to say about the four Code provisions quoted above before making its own interpretation of them.

and ordered the defendant-driver to pay the plaintiff's damages.

In its discussion of the point, the Supreme Court noted that, in the absence of an intervention by the civil plaintiff in the criminal action, the criminal court only had jurisdiction to determine if the defendant had committed a criminal act, which required proof of intent by the defendant, or at least a clear ability to foresee the consequences of his actions; that the criminal court had no jurisdiction to pass upon the question of whether a quasi-crime (or tort) had been committed by an act of simple negligence; and that an acquittal in the criminal action, while res judicata in any subsequent civil action to recover damages for an alleged criminal act, could not be asserted as res judicata in a subsequent civil action to recover damages for a quasi-criminal (or tortious) act:

> . . . In conformity with Arts. 2362 and 2363 C., criminal judgments result in res judicata in civil cases only if the offended party intervened and, outside of that case, when it is ruled if the accused is the perpetrator of the action, if said charges are founded, from the point of view of the Criminal law, and if he presents the required characteristics for the application of specific provisions of that law. According to Arts. 1122 and 1123 Pr., condemnatory penal judgments always result in res judicata and the acquitting judgment or those of definite dismissal yield such results only in specific cases, one of those being, if said judgments are based on the non-existence of the crime or quasi-crime which is the subject of the trial, in such cases in which the acquittal or dismissal originate from the existence of circumstances which exempt from

> criminal liability not being understood as included in such circumstance. . . . From this stems the fact that restrictive courts of justice have to decide if an action is or is not premeditated and if it was perpetrated or not by gross negligence, but setting these aside, they cannot proceed with their review to decide if there existed any degree of guilt or if it concerns a case of an act of God, thus determining if a quasi-crime existed or not, in which case it would properly pertain to civil courts. . . . "[T]hus the accused is not liable for the criminal action and for this reason he obtains a dismissal, it is clear that this judgment produces a res judicata in the civil area to pursue indemnity for damages caused by this penal violation; but this does not mean that the liabilities for which the prisoner is liable, if the action is considered a quasi-crime cannot be pursued before those courts for repairing the damages caused. . . . In conformity with the forementioned this Supreme Court reaches the conclusion that the judgment passed by the Court [below] has violated Art. 2362 C. when it accepted the exemption of res judicata in the judgment passed on criminal matters offered by the defendant Mr. Espinoza Gutierrez, as it is not produced with regard to him and much less with regard to the other defendant party [the corporate employer of Mr. Espinoza Gutierrez].

(S.A. 55-56).

The same point is made in *Renato Vivas v. Esso Standard Oil Co.*, Aug. 7, 1949, Corte Suprema de Justicia, Nicar., Bol. Jud. 16293 (S.A. 61, 66). In that case, the driver of a tanker-truck owned by Esso Standard Oil was

acquitted of criminal responsibility for a vehicular accident which resulted in a death. The victim's legal representative thereafter brought a civil action for damages against Esso, which contended that the acquittal of its driver in the criminal action was res judicata on the issue of its liability in the civil action. The Supreme Court rejected this position, as follows:

> . . . It is true that the criminal act could include a civil claim when a damage results, which was performed with the intent to cause harm; if there was not such an intention, but there was a damage, it was then a quasi-crime; that is, there arises the obligation to repair only the damage; the action when referred to this, is decided before the Civil Courts and at the request of the injured party, whereas in a criminal case, the offender is judged by the Courts of this kind; now, according to what has just been said, the criminal act in many cases subjects the guilty party to a civil reparation; therefore, two actions result, one, which is public and the other private, which is very much like the claim for damages, has the same objective, but as it is accessory to the public action, it can be heard before the criminal court; and whatever these courts decide, in reference to the responsibility of the accused, will be res judicata in a Civil case, since the public interest that is typical of the criminal act, prevails over the private interest which extinguishes the capacity to prosecute for the damage caused by the criminal act; however, when this is strictly a civil crime, the action to pursue this damage must be brought before the civil courts; the restrictive courts of justice will not have proper jurisdiction to hear the case and to decide on this matter; and so it is

that if the accused is not liable for the criminal offense, an acquittal is obtained; it is obvious that this judgment will operate as res judicata in the civil jurisdiction to seek reparation for the damage caused by this criminal infraction; but this does not mean that the responsibility acquired by the defendant if the act committed constituted a quasi-crime, could not be pursued before the civil courts, in order to compensate the damage caused.

Aubry and Rau, on this subject, comment: "The criminal courts are not generally, besides the intervention of the aggrieved party, called to resolve on facts when these are not considered as being a criminal infraction, but, rather, they have the characteristics of a quasi-crime, when they have a legal repercussion of some kind in reference to a civil matter. Taking into account the nature of the institution of these Courts, its decisions leave intact the issue of knowing whether a civil crime or a quasi-crime has been committed; and later continue like this: "The resolutions of acquittal based on the fact that the action charged to the accused does not constitute a criminal act, cannot be invoked before the civil courts as res judicata in reference to the very existence of the fact, the restrictive courts of justice cannot decide as to the existence of a quasi-crime, since this is a civil matter." In the case sub-lite, the instruction followed before the First Local Criminal Court Judge, was according to the decree of the Court, to investigate the death of Mr. Vivas Lacayo, which occurred as a result of an accident, and for that reason, the investigation was directed against the driver who was driving the tanker truck, providing the evidence that was deemed proper to establish

> his criminal liability, resulting from said evidence that there was none so as to be able to charge him with a crime; this, of course, does not mean that the interested parties cannot, now, seek before the civil courts, the indemnity for the damage suffered as a result of the act of the driver, considered as a quasi-crime; that is, that even if the element of criminal intent is lacking in the commission of the act, in order for it to be considered a criminal act, the culpability could later be established due to negligence or imprudence, for the purposes of a civil crime; now then, the plaintiff did not appear in the criminal proceeding and what he now seeks is not the indemnity for the damage caused by the criminal act, but that he receive reparation for the damage that, according to him, was inflicted by the act of the driver, considered as a quasi-crime; and for that same reason in this case, the decision handed down in the criminal division does not have any influence on the civil trial; Art. 1123 Pr.

(S.A. 69-70). As we explained at page 35 of our answer brief, this decision also observes that, in cases (like the instant case) in which a principal is vicariously liable for the quasi-crimes of its agents, an acquittal of an agent in the underlying criminal action will have no res judicata effect in a subsequent civil action against the principal.

There is a third decision of the Supreme Court of Nicaragua which is also squarely on point: *Engracia Martinez v. Rafael Cabrera & Co., Ltd.*, Dec. 21, 1957, Corte Suprema de Justicia, Nicar., Bol. Jud. 18768 (S.A. 80). In that case, a child died in a movie theater fire. The owner of the movie theater was acquitted of criminal charges

arising out of the incident – and, relying upon Article 2362 of the Civil Code, he asserted the acquittal as a bar to a subsequent civil action for damages. The Supreme Court rejected the defense, as follows:

> . . . [T]he Supreme Court is of the opinion that Article 2362 C. is not applicable to the case, because there is no identity in the cause, which is a requirement to invoke the res judicata, because at the criminal trial, the prosecuted were released of any participation in the commission of a voluntary crime or by gross negligence, whereas in the civil trial now under consideration, we are dealing with a quasi-crime.
>
> It cannot be held, as the attorney for the appellants contends, that the quasi-crime always involves gross negligence. The restrictive Justice Courts have, to the exclusion of any other jurisdiction, the obligation to decide whether the accused or denounced individual is the perpetrator of the acts with which he is charged, as constituting a transgression of criminal law, if said acts are imputable from the standpoint of criminal law and finally, if these acts present the characteristics that are required for the application of this or that disposition of that law; Criminal Courts are not called to decide upon acts that do not represent infringement of the criminal law, but instead, constitute a quasi-crime (Aubry Et Rau V. 3 p. 406 – French Edition). According to the purpose and nature of these courts they do not decide whether or not a quasi-crime has been committed, or whether the facts that are imputed to the prosecuted are imputable because of the civil consequence that can derive, and whether these charges can or

> can not give place to the reparation of the damage. The same authors mentioned above, Aubry and Rau, in their comments in these matters state: The judgment that acquits any person of the accusation of homicide, even involuntary, is not an obstacle for the admission of a claim for damages and interests formulated against him in view of the facts that constituted the basis of his criminal trial, but that are not considered any more except as constituting a simple crime of civil law or a quasi-crime in the sense of Article 1382 et al., "in support of their argument Aubry Et Rau cited a long list of writers and numerous decisions of the French Courts. From the abovementioned statements, it is deduced that the Court [below] acted rightfully by not applying article 2362 C. to the case in question and ascertaining that the acquittal in a criminal procedure does not operate as res judicata in a civil trial for the redress of the damage caused by a quasi-crime.

(S.A. 85).

When undersigned counsel brought these decisions to the Court's attention at oral argument, the Chief Judge asked if any of them awarded moral damages under the Penal Code – and when undersigned counsel answered "no," the decisions were apparently dismissed by the Court as irrelevant. The reason that these cases do not go on to discuss the issue presented here, however, is that they were all decided before the 1974 enactment of Article 46 of the Penal Code. In addition, the issue presented here was simply not raised by the parties for decision. We also think the question missed the point. What these decisions demonstrate is that the acquittal of an agent in

a criminal action does *not* give rise to the type of pseudo-defense claimed by the defendants here (which is nowhere stated in the Nicaraguan Codes) – that the principal of a negligent agent acquitted of a crime is liable for pecuniary damages only under the Civil Code, and not liable for pecuniary and moral damages under the Penal Code.

What these decisions (and the Code provisions which they explain) *do* demonstrate is that the acquittal of an agent in a criminal action can give rise to a defense (at best, and in only limited circumstances) *on the issue of liability*, and on that issue alone, in a subsequent civil suit to recover damages for the commission of *the crime*. These decisions (and the Code provisions which they explain) also demonstrate beyond any doubt here that the acquittal of the defendants' agents on charges of culpable homicide in Honduras provides no defense of any kind whatsoever in this subsequent civil action to recover damages for the defendants' *quasi-criminal* conduct under the Penal Code. And because (as we have previously demonstrated in our discussion of Article 3106 of the Civil Code), the defendants are liable in this case "for indemnification of the damages in conformance with the prescriptions of the *Criminal Code*," the plaintiffs were entitled to the damages specified in Article 46 of that Code – both pecuniary and moral.

Most respectfully, the Court has been misled by the defendants into inventing a partial res judicata defense on the issue of damages which nowhere exists in the Nicaraguan Codes. The damages available to the plaintiffs under Article 46 of the Nicaraguan Penal Code *are* available to them here, notwithstanding the acquittal of

the defendants' agents of culpable homicide in Honduras, because Article 2363 of the Civil Code says exactly that. Both the Nicaraguan Supreme Court and the Nicaraguan National Assembly have also said exactly that – and we respectfully urge the Court to grant us a rehearing, and to conform its decision to the law of Nicaragua, as that law has been announced by both of those clearly competent institutions.

E. The plaintiffs' due process rights.

Finally, we must also respectfully insist that the panel's opinion violates the plaintiffs' due process rights under the United States Constitution. As the defendants themselves pointed out in their initial brief, a state court violates a litigant's due process rights under the Fourteenth Amendment when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 108 S. Ct. 2117, 2126, 100 L. Ed.2d 743, 758 (1988). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed.2d 521 (1981).

In the instant case, the law of Nicaragua is clearly established by the provisions of the Nicaraguan legal codes, by a recent advisory opinion of the Nicaraguan Supreme Court, and by a recent Resolution of the Nicaraguan National Assembly; all of that law was brought to the Court's attention at one point or another during the course of this proceeding; and the conclusion reached in the panel's opinion plainly contradicts that

law in every particular. Most respectfully, the fundamental notions of fairness which lie at the heart of the due process clause simply require a thorough reconsideration of the panel's opinion before it is permitted to stand as the last word on the subject by this Court. We earnestly implore the Court to grant us that relief. We would also welcome an opportunity to reargue the case to the panel if it should be inclined to hear oral argument on this motion.

[Service list omitted].

Respectfully submitted,

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Attorneys for Appellees Tania Flores De Brenes, et al.

By: _____
JOEL D. EATON
Fla. Bar No. 203513

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 92-01408; 92-00925

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S. A., a foreign corporation,

Appellants,

vs.

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.,

Appellees.

_____/

MOTION FOR REHEARING EN BANC

The appellees in case no. 92-00925, Tania Flores de Brenes, etc., et al., plaintiffs below, move the Court for rehearing en banc in this cause. As grounds therefor they would respectfully show:

The issue presented in this appeal – which is common to 34 different wrongful death cases filed below, and which therefore affects scores of persons – is whether the law of Nicaragua provides for the recovery of intangible damages by a decedent's survivors in aviation disaster/

wrongful death cases, as the law of Florida does. After hearing extensive expert testimony on the subject, the trial court ruled that Nicaraguan law is consistent with Florida law on this point. Less than six months ago, the Supreme Court of Nicaragua issued an advisory opinion declaring that the law of Nicaragua provides for the recovery of intangible damages in cases like this one. By a vote of 9-0, the Justices declared (1) that both economic and intangible damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, both economic and intangible damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua, which deal with civil liability for both crimes and "quasi-crimes" (or torts); and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that intangible damages are recoverable in such an action under these provisions of the penal code.[1]

Two weeks ago, after an oral argument in which undersigned counsel was given very little opportunity to argue his clients' full position, a panel of this Court

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[1] For the convenience of the Court, a copy of the Nicaraguan Supreme Court's opinion, in both Spanish and English, is attached hereto. As we explained in detail in the "Notice of Supplemental Authority and Request to Take Judicial Notice" (and the supplement thereto) by which we brought this opinion to the Court's attention, the issuance of such an opinion (or "consulta," as the defendants prefer to call it) is a legitimate function of the Nicaraguan Supreme Court, and the defendants challenged neither the authenticity nor the legitimacy of the opinion in their response.

reversed the trial court's determination that intangible damages are recoverable under Nicaraguan law. It held (1) that intangible damages are *not* recoverable under Article 2509 of the Civil Code of Nicaragua; (2) that the Penal Code of Nicaragua provides for the recovery of intangible damages *only* from a person who has been convicted of a crime; and (3) that the acquittal of an agent *relieves* the principal of civil liability for intangible damages under the Penal Code. Remarkably, the panel did not even mention the existence of the Nicaraguan Supreme Court's recent advisory opinion, much less explain why it felt it was competent to decide the substance of Nicaraguan law in a manner squarely contrary to each and every point in that opinion. And if that were not remarkable enough, before it could reach the conclusion it did, the panel had to overrule a decision (which stood squarely in its way, and which simply required that the trial court be affirmed) rendered less than 10 years ago by another panel of this Court.[2]

Less than 24 hours ago, in response to the panel's opinion in this case, the National Assembly of Nicaragua issued an official Resolution declaring that the law of Nicaragua is correctly stated in the Nicaraguan Supreme Court's recent advisory opinion – and thus, that the interpretation of Nicaraguan law contained in the panel's opinion is wrong.[3] Most respectfully, the panel's conclusion that the law of Nicaragua *disallows* what both the

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[2] For the convenience of the Court, a copy of both the panel's opinion and the conflicting decision is attached hereto.

[3] Because this Resolution was issued on the last day available for filing this motion, only a "fax" copy of it is available for filing at the present time. A "fax" copy is therefore attached

Nicaraguan Supreme Court and the Nicaraguan National Assembly say it plainly *does allow* is a conclusion of obviously exceptional importance. The panel's determination to overrule a decision of a prior panel of this Court in order to enable it to reach that upside-down conclusion also creates a stark intra-district conflict. And both of these rulings, in our judgment, simply cry out for reconsideration by the en banc Court. Indeed, if there were any purpose at all in enacting Rule 9.331, this is the paradigm for which the Rule must have been intended.

A. The intra-district conflict.

[Discussion omitted].

B. The question of exceptional importance.

This Court also has jurisdiction to rehear a case en banc if it presents a question of "exceptional importance."[4] Because this Court sits in the "hub of the Americas," it is frequently called upon to decide the law of

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hereto. We will supplement this motion with a fully authenticated document and an appropriate English translation of it as soon as we possibly can. Pursuant to §§ 90.202 and 90.203, Fla. Stat. (1991), we respectfully request that the Court take judicial notice of the authenticated document when it is received.

[4] The First District has recently ventured a definition of this phrase to include "(1) cases that may affect large numbers of persons, and (2) cases that interpret fundamental legal or constitutional rights." *In Interest of D.J.S.*, 563 So.2d 655, 657 n.2 (Fla. 1st DCA 1990). Because the panel's opinion affects 34 wrongful death cases involving scores of persons, the first criterion is clearly satisfied here. For reasons which will appear in the argument which follows, the second criterion is clearly satisfied here as well.

Latin American countries. To date at least, it was bound in that task by the settled principles of the doctrine of comity:

> Bouvier defines comity as the practice by which one court follows the decisions of another court on a like question, though not bound by the law of precedents to do so. In Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95, the Supreme Court of the United States defined comity as neither a matter of absolute obligation, nor of mere courtesy and goodwill, but it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws.
>
> . . . [T]he rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy. . . .

Herron v. Passailaigue, 92 Fla. 818, 110 So. 539, 542 (1926). *Accord Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604, 609, 41 A.L.R.2d 1071 (Fla. 1953) ("The rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rules of public policy."), *cert. denied*, 348 U.S. 816, 75 S. Ct. 27, 99 L. Ed. 643 (1954); *Belle Island Investment Co., Ltd. v. Feingold*, 453 So.2d 1143, 1145 (Fla. 3rd DCA) ("In Florida, the rules of comity may not be departed from except to protect the citizens of our

state or some paramount public policy."), *review dismissed*, 459 So.2d 1039 (Fla. 1984). *See Metropolitan Investment Corp. v. Buchler*, 575 So.2d 262 (Fla. 3rd DCA 1991).

Neither of these two exceptions to the "rules of comity" which "may not be departed from" exist in the instant case. There are no Florida citizens involved in this case who need the protection of this Court from Nicaraguan law. The defendants are Honduran corporations, and the numerous plaintiffs and beneficiaries deprived of their damages by the panel's opinion are Nicaraguan citizens (most of whom live in Nicaragua, some of whom live in Florida) seeking application of their own law. Neither is there any paramount rule of public policy which needs to be enforced at the expense of Nicaraguan law here, because Florida law plainly provides for precisely the type of recovery which the panel has denied our Nicaraguan clients by its opinion. The doctrine of comity therefore required the panel to follow the law as plainly stated by the highest Court in Nicaragua – a Court which was *obviously* far better situated and much more competent to determine the law of Nicaragua than any panel of this English-speaking Court (with no access to Nicaraguan law other than the argumentative versions submitted to it by the parties) could ever hope to be. The panel simply ignored the Nicaraguan Supreme Court's recent advisory opinion on the subject, however – and announced several conclusions exactly contrary to that Court's undeniably expert explanation of Nicaraguan law.

The two opinions speak very well for themselves on the point of their inherent conflict, as a simple side-by-side comparison will reveal:

The Nicaraguan Supreme Court's Opinion	The panel's opinion
In Articles 2509 and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.	No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]very one who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. [Civil] it mentions that in an accident involving public transporation, [sic] civil liability will always abide by the Criminal Code. Article 2 of the Criminal Code describes as punishable an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn. [Penal]). The Criminal Code of Nicaragua, in the Chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn. Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsibile [sic] by virtue of a civil relationship

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. . . . Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

> binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12/21/1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberna deShon & Co., judgment date 12-9-1969.

Most respectfully, that the panel read Nicaraguan law exactly contrary to the manner in which the Nicaraguan Supreme Court stated it is simply beyond debate here.[5]

Because the panel did not bother to explain why it chose to ignore the Nicaraguan Supreme Court's opinion, we can only assume that it accepted one or both of the arguments which the defendants advanced in their reply

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[5] A more appropriate translation of Article 2509 is "Anyone who, by fraud, failure, negligence or imprudence or through a malicious act causes injury to another is obliged to redress it, with damages." That translation obviously draws no distinction whatsoever between pecuniary damages and moral damages. In any event, the translation used by the panel also draws no such distinction.

brief in an effort to avoid the opinion. First, the defendants argued that, according to a 1961 "consulta" of the Nicaraguan Supreme Court, the issuance of "consultas" (like the recent advisory opinion in issue here) was not one of its functions and was disfavored and therefore "restricted." Although we fail to see the relevance of this point, since the Supreme Court actually issued the "consulta" in issue here in 1992, the fact remains that the substance of the 1961 "consulta" was not fairly represented to the panel in the defendants' reply brief (and was misrepresented at oral argument).

The 1961 "consulta" (which can be found in English translation at page A244 of the Appendix to Reply Brief of Appellants) does tell an inquiring *attorney* that "consultas" requested by attorneys and individuals are disfavored and restricted, but it also plainly states that "Inquiries that come from government authorities and officials shall be answered, unless they pertain to cases that may eventually be heard by the High Court. Judges may also present inquiries to their superiors, and this would be more appropriate." The 1992 "consulta" which the panel ignored in the instant case was issued in response to an inquiry by a judge. The 1961 "consulta" therefore provided no reason whatsoever for the panel to refuse to honor the doctrine of comity with respect to the 1992 advisory opinion with which it chose to disagree in every particular.

The defendants also argued that the Supreme Court's advisory opinion could legitimately be ignored because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. By that reasoning, of

course, the instant case cannot be decided by *any* court, including this one. If only the National Assembly can interpret the law, then this Court certainly has no authority to do so; and if this Court *does* have authority to do so, then the unanimous Justices of the Nicaraguan Supreme Court have a hundred times *more* authority on a question of Nicaraguan law. Even if the Nicaraguan Supreme Court's opinion is "only" advisory – just as, in the identical sense, the panel's opinion can "only" be advisory – it is unquestionably more compelling on an issue of Nicaraguan law than any opinion of this Court could be. And it is precisely for such reasons that the doctrine of comity was created.

In any event, the more important point here is that, whatever justification this constitutional provision may have supplied for the panel's determination to ignore the Supreme Court's explanation of Nicaraguan law, that justification no longer exists. The National Assembly has now "officially interpreted" the law, and that interpretation is consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law. And because the Constitution of Nicaragua expressly confers that power upon the National Assembly, there can be *no* justification for any further refusal to honor the doctrine of comity in the instant case.

We also respectfully insist that the panel's interpretation of Nicaraguan law was simply wrong. The trial court's reading of Nicaraguan law was supported not merely by expert testimony and a recent advisory opinion of the Nicaraguan Supreme Court (and now, by a Resolution of the Nicaraguan National Assembly), but by several prior decisions of the Nicaraguan Supreme Court

(some of which were cited in the Supreme Court's advisory opinion itself). The trial court's ruling on Nicaraguan law was also squarely supported by the published treatises of Nicaragua's two leading legal commentators. The panel also elected to ignore all of these additional authorities on the point, notwithstanding that the defendants provided it with *no* comparable authority to the contrary. This is not the place to quarrel with the panel's opinion, however. We mention these things simply to underscore the compelling need for the en banc Court to take a hard look at the panel's opinion before it is permitted to become the final word of this Court. For our quarrel with the panel itself, we refer the Court to our motion for rehearing – which we adopt and incorporate here by reference.

Finally, we must also respectfully insist that the panel's opinion violates the plaintiffs' due process rights under the United States Constitution. As the defendants themselves pointed out in their initial brief, a state court violates a litigant's due process rights under the Fourteenth Amendment when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 108 S. Ct. 2117, 2126, 100 L. Ed.2d 743, 758 (1988). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed.2d 521 (1981).

In the instant case, the law of Nicaragua is clearly established by the provisions of the Nicaraguan legal codes, by a recent advisory opinion of the Nicaraguan Supreme Court, and by a recent Resolution of the

Nicaraguan National Assembly; all of that law was brought to the Court's attention at one point or another during the course of this proceeding; and the conclusion reached in the panel's opinion plainly contradicts that law in every particular. Most respectfully, the fundamental notions of fairness which lie at the heart of the due process clause simply require a thorough reconsideration of the panel's opinion by the en banc Court before that opinion is permitted to stand as the last word on the subject by this Court. We earnestly implore the Court to grant us that relief.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance. I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this Court, and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984).

[Service list omitted].

Respectfully submitted,

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By: /s/ _____
JOEL D. EATON
Fla. Bar No. 203513

[TRANSLATION]

MINISTRY OF
FOREIGN RELATIONS
Managua, Nicaragua

No. 940285 March 23, 1994

HIS EXCELLENCY,
MR. JOHN MAISTO
AMBASSADOR OF THE UNITED STATES OF AMERICA
CITY (MANAGUA)

Mr. Ambassador:

I have the honor to address Your Excellency again in reference to the claim filed by 32 Nicaraguan families (mentioned in Note No. 930197 of February 9, 1994), members of which died in an airplane accident at Cerro de Hule in the Republic of Honduras, on October 21, 1989 during a flight on TAN/SAHSA Airline headquartered in Miami. Said claim was filed at the III District Court of Appeals of the State of Florida, and recently the Florida State Supreme Court denied a motion for review, declining to accept jurisdiction on the case per a Resolution of February 11, 1994, attached for your easy reference.

In regard to this regrettable accident, I wish to inform you that in June, 1990, the above-mentioned Airline, TAN/SAHSA, admitted its responsibility for negligence and offered to indemnify the surviving family members for damages and liability. In September 1991 the corresponding Court set Miami as the place of jurisdiction for damage and liability claims. Later, in May 1992, the first preliminary case for determining amounts of damages and liability was filed at the Dade County 11th Court of Appeals, including both material damages and damages

for pain and suffering. At this stage of proceedings, the latter Court found in favor of the Nicaraguan plaintiffs, in that such damages, both material and moral, are payable by Nicaraguan law. Under these circumstances some claims were partially formalized, both judicially and out of court.

The III District Court of Appeals of Florida State revoked this sentence and later denied a Motion for Review by the plaintiffs, followed by the State Supreme Court in similar fashion, as indicated, without having analyzed the arguments presented on points of Nicaraguan Law, and based on a Consultive Opinion of the Supreme Court of Justice and an Interpretative Law of Nicaragua's National Assembly, contravening legal opinions from two State Powers of Nicaragua, with which the Executive branch agrees. I attach these documents for your reference.

Thus, the resolutions issued by these High Tribunals of the State of Florida are contrary to the norms established by Nicaraguan Legislation, erroneously replacing the interpretative functions of these laws, both the Judicial and the Legislative Branches of the Republic of Nicaragua, upon giving them a different interpretation from that which has been stipulated by both Branches of Nicaraguan State Powers.

This refusal deprives the Nicaraguan plaintiffs of the right to fair and appropriate legal process, despite the fact that the Dade County Circuit Court found in favor of the said plaintiffs after an evidential hearing and the expert testimony of an Ex-President of the Supreme Court of Justice in Nicaragua.

In the light of this situation, I am honored to request of Your Excellency, that you present to your illustrious Government, that based on principles of international courtesy and in accordance with international law, the legislation of your country permitting, and in support of a Petition for Writ of Certiorari currently being processed, presented in representation of 32 Nicaraguan families, that the Attorney General of the United States of America present a Motion to the Honorable Supreme Court of the United States of America supporting the Motion by the Attorney General of Justice in Nicaragua, so that the said High Tribunal will hear the case and accept the Motion of the Attorney General of Justice in Nicaragua to appear and intervene in this process as State's Attorney. As an alternative, we respectfully request that the Motion be submitted to the Honorable Supreme Court of Justice so that he may appear and intervene as Amicus Curiae in support of the Nicaraguan plaintiffs.

I am also honored to reiterate, through your worthy intervention, to your illustrious Government, the support of the Attorney General of the United States of America, so that the Honorable Supreme Court of your country may hear this important case that affects the relatives of the victims of this tragic accident, involving fundamental constitutional rights and basic principles of international law, as well as courtesy between States (Comity).

Upon presenting to Your Excellency this request which is based on the excellent relations existing between our people and our Governments, I wish to take advantage of

this opportunity to express to Your Excellency my highest and most dignified consideration.

[SIGNED]
JOSE BERNARD PALLAIS
Minister of Foreign Relations
by Law

[STAMP:]

MINISTRY OF FOREIGN
RELATIONS
Managua

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

(2)

No. 93-1814

In The

Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES, Individually and as Executor, Administrator or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, Decedents,

Petitioners,

vs.

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida Third District

AMICUS CURIAE BRIEF OF THE REPUBLIC OF NICARAGUA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The Republic of Nicaragua, by and through the undersigned counsel, and with the consent of all parties, respectfully submits the following brief *amicus curiae* in support of the petition for writ of certiorari.

PROCEDURAL HISTORY

In October of 1989, a Boeing 727 aircraft operated by Respondents Transportes Aereos Nacionales, S.A. and Servicio Aereo de Honduras, S.A. (hereinafter collectively referred to as "TAN-SAHSA") crashed in Honduras, resulting in the death of 127 passengers and four crew members. Thirty-four wrongful-death actions – all filed by survivors of Nicaraguan decedents – were filed in the Florida circuit court; thirty-one of them were consolidated for pre-trial purposes. The parties stipulated that Nicaraguan law governed the issue of damages; and TAN-SAHSA stipulated that it would not contest liability for any compensatory damages held to be recoverable under Nicaraguan law. The only question in dispute was whether Nicaraguan law permitted the recovery of moral damages – principally damages for grief and mental anguish of the survivors, identical to the non-economic damages permissible under Florida law – in a wrongful-death case.

After an evidentiary hearing, including testimony for the Petitioners from a former Chief Justice of the Nicaraguan Supreme Court, the Florida trial court held that moral damages are recoverable under Nicaraguan law, and liquidated the damages awardable in the two

above-captioned cases, resulting in the two final judgments which were appealed to the District Court of Appeal of Florida, Third District. The additional 32 cases remain pending in the trial court, and by stipulation will be governed by the disposition of the instant cases.

During the pendency of TAN-SAHSA's appeal to the district court, the Supreme Court of Nicaragua – in a unanimous (9-0) advisory opinion rendered at the request of the Chief District Judge of the Criminal Court in Managua, on behalf of the plaintiffs in the various cases arising from the crash in this case – declared unequivocally that moral damages are recoverable in a wrongful death action under both the Civil Code of Nicaragua and the "quasi-criminal" (tort) provisions of its Criminal Code (App. 12a). In relevant part, the opinion states:

> In Articles 2509, and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded.
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> * * *
>
> The Criminal Code of Nicaragua, in the chapter on Rules to Determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act [including negligence, under Article 2 of the Criminal Code]. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn.

> Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsible, by virtue of a civil relationship binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as a consequence of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well.

Notwithstanding this controlling pronouncement, the Florida district court of appeal accepted unreflexively the defendants' contention that the Nicaraguan Civil Code permits damages only for pecuniary losses, and that the Criminal Code precludes liability for quasi-crimes if the defendant or his agent has been acquitted of criminal charges (App. 1a). The district court's opinion makes no mention of the unanimous Nicaraguan Supreme Court opinion to the contrary on both points; the only passage from the opinion which suggests the court's reasoning is its declaration that "Nicaragua is a civil-law jurisdiction," and "[i]t is axiomatic that in civil-law jurisdictions, law-making is exclusively the function of the legislature" (App. 4a). The Florida court may have concluded that in civil-law jurisdictions, judicial interpretations of legislation are meaningless, and thus that it was not required to pay any attention to the studied conclusion of the Nicaraguan Supreme Court.

Not surprisingly, the district court's decision – and especially its failure even to mention the unanimous Nicaraguan Supreme Court opinion on the precise point at issue – caused considerable consternation in the quarters of government in Nicaragua. The reaction was especially aggressive in light of

the district court's uninformed dismissal of judicial decision-making in civil-law countries. Although the legislature indeed is the primary interpretive authority under the Nicaraguan Constitution, an historical legacy of interpretive Nicaraguan Supreme Court decisions on a question is universally recognized as authoritative precedent; and the Nicaraguan Supreme Court also has unquestioned constitutional authority to summarize or restate a legislative directive, as opposed to interpreting it. Indeed, the very fact and legacy of advisory opinions is an affirmation of that authority. In light of the Florida court's declaration that "in civil-law jurisdictions, lawmaking is exclusively the function of the legislature," it is not surprising that the National Assembly of Nicaragua became the primary focus of the reaction occasioned by the court's decision.

Before the time for rehearing of the Florida court's decision had expired, the National Assembly of the Republic of Nicaragua, pursuant to its express constitutional authority, enacted an interpretive law declaring that moral damages are recoverable and have been recoverable under Nicaraguan law (App. 16a). Under Article 138(2) of the Nicaraguan Constitution, the National Assembly is granted the constitutional power to render an "Authentic Interpretation" of the law of Nicaragua. Such an interpretation, by definition, does not run afoul of the constitutional prohibition against *ex post facto* laws, because it is not a new law, but the interpretation of an existing law. Indeed, the provision of the Civil Code which codifies the *ex post facto* prohibition exempts "laws which are limited to interpreting the meaning of other laws . . . . " Were Nicaraguan law otherwise, there would

be no institution in Nicaragua empowered to interpret the statutory law.

In words which mirror the Nicaraguan Supreme Court's earlier declaration, the interpretive law (App. 16a) declares that "civil responsibility for the damages and harms referred to [in various provisions of the Nicaraguan code] is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages." The National Assembly then proceeded to address each of the relevant legislative provisions misinterpreted by the Florida appellate court, and to explain in detail its unequivocal declaration that moral damages are permitted in the instant cases, notwithstanding the acquittal of the defendants' agents of criminal charges in Honduras. The interpretive law subsequently was signed by the President of Nicaragua, meaning that all three branches of the government agree with it.

Although the Nicaraguan Supreme Court's unanimous opinion alone should have been dispositive of the controversy, the unequivocal declaration of the National Assembly certainly left no room for disagreement on the point at issue before the Florida court. Indeed, it was the Florida court itself which had declared in its opinion that "lawmaking is exclusively the function of the legislature." Nevertheless, the district court of appeal issued an order which denied without explanation the Petitioners' motion for rehearing. The Petitioners subsequently sought review by the Florida Supreme Court, which has only limited constitutional authority to review district court decisions, and which denied review without explanation.

THE INTEREST OF THE REPUBLIC OF NICARAGUA IN THIS CONTROVERSY

The Florida district court's decision is binding not only on the parties in the two actions which were before it, but also on the plaintiffs in 32 other cases currently pending in the Florida trial court. Those plaintiffs have not to date participated directly in this proceeding, and yet they have suffered not only a deprivation of the substantive rights to which they unquestionably are entitled under the law of their country, but in addition – along with the Petitioners – a deprivation of their fundamental right of due process, which is violated whenever a construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction when such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988). In one sense, the Republic of Nicaragua appears in this Court on behalf of those citizens. In a larger sense, the Republic of Nicaragua stands here for itself, as a member of the community of nations, entitled to the deference for its tradition and its institutions which all nations expect and enjoy. From this perspective, the Florida court's decision not only is a tragic denial of the unquestioned rights of private litigants; it is also an affront to the sovereignty of another nation, and by implication to the sovereignty of all nations.

SUMMARY OF THE ARGUMENT

The Republic of Nicaragua respectfully submits that the decision of the District Court of Appeal of Florida,

Third District, constitutes a denial of the right of due process of the Petitioners and the other plaintiffs similarly situated, because it declines deference to the unequivocal declarations of all three branches of the government of the Republic of Nicaragua, on a question of Nicaraguan law. In addition, the Republic respectfully submits that the Florida court's decision violates due process because it violates the act of state doctrine, by declaring invalid the official act of a foreign sovereign performed within its own territory.

ARGUMENT

The Petitioners have demonstrated that the Florida court's analysis of Nicaraguan law (which reflects no independent study of the issue, but instead accepts wholesale the Respondents' selective discussion of the relevant statutes and judicial decisions) is fundamentally erroneous in virtually every respect. In addition, the Florida court's error implicates two fundamental policies of federal law. The first, which is discussed at length in the petition itself, is that, subject to narrow exceptions not applicable here, the federal constitutional guarantee of due process required the Florida court's deference to the superior knowledge of the Nicaraguan government on an issue of Nicaraguan law. Because the declarations of the Nicaraguan Supreme Court and its National Assembly are unambiguous and unequivocal – indeed, both responded specifically to the issue raised in this particular case – the Florida court had no authority to revisit the substantive propriety of those declarations. *See, e.g., United States v. Pink*, 315 U.S. 203, 220-21 (1941) (official

declaration of officer of the Russian government as to the intended extraterritorial effect of a prior Russian decree of nationalization is conclusive on the courts of this country).

Second, because the Nicaraguan Supreme Court decision and the National Assembly's authoritative interpretation both purported to resolve the very point at issue in the instant litigation, the Florida court's action clearly violated due process by violating established priniciples of international comity, including the act of state doctrine, which reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964). As the Court put it in *Oetjen v. Central Leather Co.,* 246 U.S. 297, 304 (1918), *quoting Underhill v. Hernandez,* 168 U.S. 250 (1987): "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relationship between governments and vex the peace of nations.' " Thus, the doctrine provides that "the act within its own boundaries of one sovereign state- . . . becomes . . . a rule of decision for the courts of this country." *Ricaud v. American Metal Co.,* 246 U.S. 304, 310 (1918). The rule applies "[i]n every case in which . . . the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Environmental*

Tectonics Corp., Intl., 493 U.S. 400, 405 (1990). Whenever "it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. American Metal Co.*, 246 U.S. at 309.

As thus defined, the doctrine derives from "[v]arious constitutional and statutory provisions . . . reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 823 n.25. Although the doctrine rests only partly upon " 'constitutional' underpinnings," *id.* at 423, "it is plain that the problems involved are uniquely federal in nature," *id.* at 424, reflecting the view that "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425. Therefore, the issue necessarily "must be treated exclusively as an aspect of federal law." *Id.*

In the instant case, the Florida court not only ignored the unanimous declaration of the Nicaraguan Supreme Court on the precise point at issue, in the precise case at issue; it also ignored the National Assembly's legislative reaction to the Florida court's decision itself, in which the National Assembly interposed its authority to correct the Florida court's mistake. At that point, if not before, the Florida court's adherence to its decision necessarily declared "invalid the official act of a foreign sovereign performed within its own territory," *W.S. Kirkpatrick &*

Co. v. Environmental Tectonics Corp., Intl., 493 U.S. at 405, which is forbidden by the act of state doctrine.

In light of the foregoing, there can be no question of the Florida court's error. Nor, we respectfully submit, can there be any question of the important policies implicated by that error. It would be enough, we submit, to observe that the survivors of 34 decedents who were victimized by the Respondents' wrongdoing not be victimized again by the denial of redress to which they unquestionably are entitled under the laws of their nation. There are, in addition, two important underlying policies of federal constitutional dimension – the principle of comity, and the act of state doctrine. The Republic of Nicaragua entreats this Court to vindicate those policies by accepting review in this case.

CONCLUSION

It is respectfully submitted that this Court should grant the petition to review the decision of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

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No. 93-1814

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TANIA FLORES DE BRENES, Individually and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

—v.—

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court lacks jurisdiction under 28 U.S.C. § 1257 to review a decision of a state's intermediate appellate court interpreting the law of a foreign country as it applies to a state claim when petitioners' purported federal claims were not raised in the state court in the manner required by state law and were not decided by the court below.

RULE 29.1 STATEMENT

The respondents, TRANSPORTES AEREOS NACIONALES, S.A. and SERVICIO AEREO DE HONDURAS, S.A., have no parent companies or subsidiaries.

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STATUTES AND RELEVANT PROVISIONS

The relevant statutes and other provisions of Nicaraguan law are reprinted in the Appendix hereto at App. 1a-4a.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1814

TANIA FLORES DE BRENES, Individually and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

—v.—

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents TRANSPORTES AEREOS NACIONALES, S.A. ("TAN") and SERVICIO AEREO DE HONDURAS, S.A. ("SAHSA") (collectively referred to herein as "TAN-SAHSA") respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Third District Court of Appeal of Florida that moral damages are not recoverable in these cases under Nicaraguan wrongful death damage law. The decision below is reported at 625

So.2d 4 (Fla. Dist. Ct. App. 1993) and is reprinted in the Appendix to the Petition.[1]

STATEMENT OF JURISDICTION

These cases involve a state court's interpretation of the wrongful death damage law of Nicaragua which did not draw into question the validity of a treaty or statute of the United States on federal constitutional grounds. Thus, this Court would have jurisdiction to review the decision of Florida's Third District Court of Appeal under 28 U.S.C. § 1257(a) only if petitioners "specially set up or claimed" a "title, right, privilege, or immunity . . . under the Constitution . . . of . . . the United States." The decision of the Third District Court of Appeal did not involve a federal right, title, privilege or immunity. Petitioners failed to raise any federal constitutional claim in the time and manner required by Florida law and the court below did not decide the case on any federal ground. Accordingly, this Court does not have jurisdiction and the petition should be denied.

A. Petitioners Failed To Raise the Federal Due Process Claim in the Trial Court

Under 28 U.S.C. § 1257(a), federal claims must be "adequately presented" in the state courts in the time and manner required by state law. *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). If the state procedures for asserting federal claims are not followed, this Court lacks jurisdiction. *See, e.g., Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936) (Court was "without jurisdiction" because federal constitutional claim was not raised in state trial court as required by state law); *Central Union Tel. Co. v. City of Edwardsville*,

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[1] References to the Petition appear as "Pet. ___"; references to the Appendix to the Petition appear as "Pet. A - ___". References to the Appendix hereto appear as "App. ___".

269 U.S. 190, 194-95 (1925) (plaintiff in error "waived" federal claims by not following state procedures governing assertion of such claims).

Petitioners concede that they failed to raise any federal constitutional claims in the trial court and did not assert a due process claim until they moved for rehearing in the Third District Court of Appeal. *See* Pet. at 7. Petitioners' untimely assertion of a federal due process claim constituted a waiver of that claim under Florida law, which mandates that constitutional claims must first be raised in the trial court. *See, e.g., Penn v. Florida Defense Fin. and Accounting Serv. Ctr. Auth.*, 623 So.2d 459, 462 (Fla. 1993) (claim that Florida statute violated Fifth and Fourteenth Amendments was "procedurally barred for [appellant's] failure to raise it below [in the trial court]"); *Fleischer v. Fleischer*, 586 So.2d 1253, 1254 (Fla. Dist. Ct. App. 1991) ("Constitutional issues, like any other, are waived unless they are first presented in the trial court. The only exception to the raise-it-or-waive-it rule is for fundamental error.").[2] *See also Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. Dist. Ct. App. 1986) (on motion for rehearing) ("[A] party cannot present arguments in a motion for rehearing that have not been presented to the court in the appellate briefs or oral argument."). Accordingly, petitioners' failure to raise their purported due process claim in the trial court in the manner required by Florida law deprives this Court of jurisdiction to review that claim.

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[2] Petitioners' due process claim, which is based on a state appellate court's purported misinterpretation of foreign law, does not fall within the fundamental error rule. " 'Fundamental error' . . . refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law to apply, or as to the application of such a rule of law to the facts in the case." *Fleischer*, 586 So.2d at 1254.

B. Petitioners Never Asserted a Violation of the Act of State Doctrine in the Court Below

Petitioners also seek to have this Court review whether the Third District Court of Appeal's interpretation of Nicaraguan law violated the act of state doctrine even though petitioners grudgingly acknowledge that they failed to raise that issue at any stage of the proceedings in the Florida courts. *See* Pet. at 24 ("the [act of state] doctrine was not explicitly invoked by its technical appellation below").

Petitioners' argument that their act of state claim was "implicitly" encompassed within their "comity" argument, *see* Pet. at 24-25, misses the mark. First, the act of state doctrine is no longer viewed as an expression of comity; rather, it is described "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990). Second, petitioners admittedly never invoked the act of state doctrine below; they merely relied on Florida's rule of comity. *See* Pet. A - 49a-51a. Petitioners may not now contend that their state law comity claim below included a federal act of state claim which they never mentioned. *See Webb*, 451 U.S. at 496-98 (petitioners' use of phrase "full faith and credit," without more, in the state courts did not constitute invocation of federal full faith and credit clause).

This Court has "consistently refused" to address a federal issue "raised here for the first time on review of state court decisions." *Webb*, 451 U.S. at 499. As with petitioners' purported due process claim, this Court lacks jurisdiction to review the act of state claim because it was never presented or decided in the Florida courts.

STATEMENT OF THE CASE

This Petition involves two consolidated wrongful death actions brought in Florida state court by representatives of Nicaraguan citizens killed in the crash of a Honduran airliner near Tegucigalpa, Honduras on October 21, 1989. Petitioners filed suit in Florida state court against TAN-SAHSA even though the airline was subject to jurisdiction in Nicaragua and petitioners could have brought their actions in a Nicaraguan court. TAN-SAHSA agreed not to contest liability for compensatory damages and the parties stipulated that Nicaraguan damage law would apply to these wrongful death claims on behalf of these Nicaraguan citizens. The parties also agreed to litigate the legal issue of whether non-pecuniary "moral damages" were permitted under Nicaraguan law as applied to the undisputed facts.[3]

After an evidentiary hearing, the trial court held, without opinion, that moral damages were recoverable under Nicaraguan law. Florida's Third District Court of Appeal reversed the findings of the trial court as a matter of law and ruled that petitioners were not entitled to recover moral damages under Nicaraguan law for non-economic harm such as grief and mental anguish of the surviving heirs. Now, after the Third District Court of Appeal has ruled against them on what type of wrongful death damages may properly be recovered under Nicaraguan law and the Florida Supreme Court has declined review, petitioners wish to make a "federal case" out of the litigation.

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[3] All plaintiffs in the Florida proceedings were paid their full pecuniary damages by way of settlement or judgment. The total amount paid as pecuniary damages to petitioners and the other Nicaraguan plaintiffs involved was $8.4 million. Petitioner Tania Flores de Brenes was paid $1 million in settlement of her pecuniary loss damages. Petitioner Claudia Crow chose to try her case resulting in a jury verdict of $144,000 in pecuniary damages.

While petitioners seek review of the Florida Third District Court of Appeal's interpretation of the wrongful death damage law of Nicaragua, a civil law jurisdiction, they fail to discuss in their Statement of the Case the Nicaraguan civil law system, preferring instead to piece together snippets of Nicaraguan law and the "opinions" of their expert. Because an understanding of Nicaragua's legal system is necessary to a proper understanding of petitioners' purported federal claims,[4] respondents will provide an overview of Nicaraguan law on this issue and explain why the Nicaraguan Supreme Court's advisory opinion and the *post hoc* Law No. 157 recently enacted by the Nicaraguan National Assembly do not provide a basis for review by this Court.

A. Nicaragua is a Civil Law Jurisdiction Where Legislation Is the Only Source of Substantive Law

Nicaragua is a civil law jurisdiction. A basic feature of civil law systems is that the legislature has a monopoly on making law. Pet. A - 4a; R. Wilson, *Criminal Justice in Revolutionary Nicaragua*, 23 Miami Inter-American L. Rev. 269, 281-82 (1992). All rights, duties, and obligations must be expressly set forth in legislation. *See* Art. 1835, Civil Code of Nigaragua ("The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the special laws[.]"). App. 3a. A corollary to this principle of legislative supremacy is that civil law courts cannot "make" or "create" law or expand obligations or rights created by legislation. Wilson, *Nicaragua*, 23 Miami Inter-American L. Rev. at 282; J.H. Merryman & D. Clark, *Comparative Law* 496 (1978). Judicial decisions are not a source of substantive law and the common law concept of *stare decisis* is not followed.

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[4] "A mere translation of a foreign statute, without more, without the background, without the context or the area of internal application, is insufficient." *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

See Art. 194, Code of Civil Procedure of Nicaragua. App. 2a.

Article 138(2) of the Nicaraguan Constitution of 1987 further limits the power of the judiciary and vests in the Nicaraguan National Assembly the power to "officially interpret the law." App. 1a. *See* U. S. Dept. of State, "The Sandinista Constitution," published in Ohio University's *The Nicaraguan Constitution of 1987: English Translation and Commentary* 127, 147 (1991) ("the constitution vests the National Assembly—not the courts—with authority to 'officially interpret the law' (Art. 138)").

B. The Nicaraguan Civil and Penal Codes

The preliminary titles of most civil codes contain directions on the interpretation and application of code provisions. The Civil Code of Nicaragua provides that legislation is to be interpreted by examining the language of the code and the intent of the legislators who enacted it. *See* § III, Preliminary Title, "Interpretation of the Law", Civil Code of Nicaragua. App. 2a-3a.

Article 2509 is the basic provision of the Civil Code of Nicaragua dealing with indemnification of damages and losses. Enacted in 1904, Article 2509 provides:

> Everyone who by intentional misconduct, fault, negligence or imprudence or by a malicious act causes injury to another is obligated to repair it along with the harms.

Article 2509 was derived from the Civil Code of Costa Rica. At the time of Article 2509's enactment, Costa Rica did not permit recovery of moral damages. Pet. A - 6a; A. Brenes Córdoba, *Tratado de las Obligaciones* 79 (1977 reprint of 1923 ed.). Because Article 2509 does not provide for the recovery of moral damages, and because the 1904 Nicaraguan National Assembly could not have intended through general language to permit recovery of a form of damages not recognized at the

time, the Third District Court of Appeal correctly ruled that moral damages were not recoverable under the Nicaraguan Civil Code.

In 1974, the Nicaraguan National Assembly amended the Penal Code to permit recovery of moral damages but only upon the criminal conviction of the wrongdoer. *See* Art. 46 and Art. 52, Penal Code of Nicaragua. App. 3a-4a. Significantly, the Nicaraguan National Assembly did not amend the Civil Code to permit the recovery of moral damages. Pet. A - 6a. Because the flight crew on the accident aircraft were acquitted of all criminal charges, petitioners could not recover moral damages under the Penal Code of Nicaragua.

Petitioners contend that two recent developments—the Nicaraguan Supreme Court's "advisory opinion" of October 5, 1992 and Law No. 157 enacted by the National Assembly, coincidentally, on March 23, 1993, the last day for the filing of petitioners' motion for rehearing in the Third District Court of Appeal—provide a federal jurisdictional basis for this Court's review and require an award of moral damages in these consolidated actions. Petitioners' arguments have no merit.

C. The Advisory Opinion

On October 5, 1992, after respondents had filed their initial brief in Florida's Third District Court of Appeal, and as a result of the *ex parte* efforts of petitioners' representatives, the Nicaraguan Supreme Court issued an "advisory opinion" which stated that moral damages were recoverable under the Civil and Penal Codes. *See* Pet. A - 129-15a. Petitioners admit that the advisory opinion was obtained *ex parte* through the efforts of "persons sympathetic to [petitioners'] position." Pet. at 6.

As previously noted, *supra* at 6-7, the advisory opinion did not affect the provisions of the Civil and Penal Codes because judicial opinions, particularly advisory opinions, are not a source of substantive law in Nicaragua. *See* App. 2a. For this

reason, the Third District Court of Appeal found it unnecessary to discuss the advisory opinion just as it did not discuss any other Nicaraguan judicial decisions which were brought to its attention by the parties.[5]

D. Law No. 157

On March 23, 1993, in response to the Third District Court of Appeal's decision, and as a result of petitioners' lobbying efforts, the Nicaraguan National Assembly enacted Law No. 157. This new law was to take effect upon its publication, which occurred several days later. *See* Pet. A - 18a.

Law No. 157 changed Nicaraguan law by providing that moral damages can now be recovered under Article 2509 of the Civil Code *and* under the Penal Code because the absence of a criminal conviction is no longer a bar to such damages. *See* Pet. A - 16a-19a. Law No. 157 is new legislation which would alter the substantive rights of the parties. For the first time in the history of Nicaragua, Law No. 157 created a civil remedy for moral damages under Article 2509 of the Civil Code. Petitioners erroneously argue that the new Law No. 157, enacted in 1993, permits them to recover moral damages in these consolidated cases arising out of a 1989 accident.

Contrary to petitioners' suggestions, the Third District Court of Appeal did not rule that Law No. 157 was invalid or illegitimate. The Third District Court of Appeal apparently agreed with respondents that Law No. 157 did not apply because the Nicaraguan Constitution of 1987, the supreme law of Nicaragua, absolutely prohibits the retroactive application of *any* law:

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[5] For example, the Third District Court of Appeal did not cite to the Nicaraguan Supreme Court's decision in *Carazo Olivier v. Texaco Caribbean, Inc.*, April 2, 1968, Corte Suprema de Justicia, Bol. Jud. 56, which held that "there is no cause of action for the claim of moral damages, so it is dismissed." In fact, no judicial decision in the history of Nicaraguan jurisprudence ever has awarded moral damages in a wrongful death case.

> The law does not have retroactive effect, except in criminal matters when it favors the accused.

Art. 38, Constitution of Nicaragua. App. 1a. Not surprisingly, petitioners do not even mention Article 38 of the Nicaraguan Constitution in their Petition.[6]

REASONS FOR DENYING THE WRIT

A. The Court Lacks Jurisdiction

As noted earlier, this Court lacks jurisdiction under 28 U.S.C. § 1257 because petitioners never raised the act of state doctrine in the Florida courts and only raised the federal due process claim in an untimely manner when they moved for rehearing of the decision of the Third District Court of Appeal. Moreover, neither issue ever was decided by the court below.[7] Respondents, however, briefly will address the substance of petitioners' purported federal claims so that this Court will not be left with the mistaken impression that those claims have any merit.

B. The Florida Third District Court of Appeal Did Not Violate the Due Process Clause in its Interpretation of the Wrongful Death Damage Law of Nicaragua

Petitioners cannot properly assert a claim under the Due Process Clause on the basis of *United States v. Pink*, 315 U.S. 203 (1942). *Pink* involved the recognition of a foreign decree because of a treaty of the United States known as the Litvinov Assignment. The federal question at issue in *Pink* derived

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[6] Instead, petitioners seek to equate Law No. 157 to an intervening decision of a Florida court in a case governed by Nicaraguan law. *See* Pet. at 10 n.3. Petitioners' reliance on Florida principles of retroactivity demonstrates how far removed this case is from any federal issues.

[7] When a state court fails to address a federal question, this Court assumes that "the omission was due to want of proper presentation . . . unless the aggrieved party can affirmatively show to the contrary." *Webb*, 451 U.S. at 495.

from the treaty and the *Pink* Court specifically noted that the "claim of the United States based on the Litvinov Assignment raises a federal question." *Pink*, 315 U.S. at 217. The case at bar does not involve a treaty of the United States from which petitioners might derive a federal right.

Petitioners' reliance on *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), for the proposition that a state court's "misconstruction" of the law of a foreign country violates the Due Process Clause, is misplaced. *Wortman* did not involve the interpretation of the law of a foreign country. Instead, *Wortman* analyzed whether a forum state's application of its own statute of limitations to claims governed by the laws of other states and its interpretation of the laws of other states violated the Full Faith and Credit Clause or the Due Process Clause's restrictions on choice of law. *Wortman* does not apply here because this case involves the interpretation of the law of a *foreign* country applied pursuant to stipulation by the parties.

Even if the analysis in *Wortman* could be extended to the interpretation of a foreign country's law,[8] petitioners have not set forth a due process claim. As the Court noted in *Wortman*, a mere misconstruction by the forum state of the laws of a sister state is not a violation of the Full Faith and Credit Clause or the Due Process Clause. *Wortman*, 486 U.S. at 731. *Accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 834 (1985) (Stevens, J., concurring).

Moreover, petitioners' contention that the Third District Court of Appeal's interpretation of Nicaraguan law contradicts the Nicaraguan Supreme Court's advisory opinion or Law No. 157 and, therefore, violates petitioners' purported due process rights is erroneous. The Third District merely

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[8] Respondents do not believe that it can. While "Article 4 of the Constitution confers the right to have full faith and credit `given in each state to the public acts, records and judicial proceedings in every other state'. . . [n]o such right, privilege or immunity, however, is conferred by the Constitution . . .in respect to the judgments of foreign states or nations." *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

recognized that petitioners' reliance on the eleventh hour advisory opinion was misplaced because, under Nicaraguan law, judicial decisions, much less advisory opinions, are not sources of positive law and the common law concept of *stare decisis* is not followed. *See supra* at 6-7.

Finally, Law No. 157 cannot be applied retroactively in these cases. The Nicaraguan Constitution, which is the supreme law of Nicaragua, forbids the retroactive application of *all* laws. *See* Article 38, Constitution of Nicaragua. App. 1a. Thus, Law. No. 157, enacted in 1993, cannot be applied retroactively to enhance damages for claims arising from this 1989 accident.[9]

C. The Florida Third District Court of Appeal Did Not Question the Validity of Any Acts of the Nicaraguan Government and, Therefore, Did Not Violate the Act of State Doctrine in its Interpretation of the Wrongful Death Damage Law of Nicaragua

Petitioners erroneously contend that the Third District Court of Appeal violated the act of state doctrine by ruling that they could not recover moral damages. As the Court recently explained in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990), the act of state doctrine applies only where "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

The factual predicate for the act of state doctrine is missing here because nothing in the litigation required the Florida

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[9] Indeed, retroactive application of Law No. 157 would have violated respondents' due process rights under Florida Supreme Court precedent. *See, e.g., Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411, 414 (Fla. 1990) ("[D]amages and penalties . . . for which [a party] may be held liable cannot be constitutionally enlarged after the date of the alleged [wrongful act]."). This Court recently addressed the constitutional problems posed by retroactive application of legislation. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497-1501 (1994).

courts to pass upon the validity of any acts of the Nicaraguan government. In this case, the Third District Court of Appeal simply interpreted the law of Nicaragua as it applied to petitioners' state claims. Respondents never argued below that the post-accident, post-appeal advisory opinion of the Nicaraguan Supreme Court or Law No. 157 were invalid, although both were admittedly obtained as a result of petitioners' lobbying efforts, and the Third District Court of Appeal did not in any way hold that these acts were not the valid and legitimate acts of a foreign sovereign. As explained above, *see supra* at 8-10, the express provisions of the Nicaraguan Constitution make it clear that neither the 1992 advisory opinion nor the *post hoc* Law No. 157 enacted in 1993 could be applied to make respondents liable for moral damages arising out of a 1989 accident.[10]

If petitioners were correct that the act of state doctrine is somehow implicated here, then every case involving the interpretation and application of foreign law under Federal Rule of Civil Procedure 44.1 would present an act of state issue. The party on the losing side of a foreign law argument inevitably would contend that the court violated the act of state doctrine by rejecting the losers' view as to which aspect of foreign law should control the controversy. As this Court stated with respect to the Full Faith and Credit Clause:

> If every time the courts of a state put a construction upon the statutes of another state, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

Glenn v. Garth, 147 U.S. 360, 368-69 (1893).

[10] In addition, nothing in Law No. 157 provides for its retroactive application. *See* App. 16a-17a.

D. No Special and Important Reasons Exist for Granting the Writ

Assuming, *arguendo*, that petitioners had asserted federal claims in a timely manner and that the Third District Court of Appeal's opinion somehow implicated the Due Process Clause or the act of state doctrine, the Court nevertheless should deny the Petition because the decision below simply does not present any federal questions of importance.[11]

The enactment of Law No. 157 by the Nicaraguan National Assembly demonstrates that review by this Court would be a waste of judicial resources. Because the National Assembly has now changed Nicaraguan law concerning moral damages, the decision of the Third District Court of Appeal is of limited precedential value. It will affect only these cases and no future cases filed in Florida or elsewhere to which Nicaraguan law might apply. The Third District Court of Appeal's decision, therefore, is limited to its facts and no special and important reasons exist to grant certiorari. *See* Sup. Ct. R. 10.1.

More simply, the issue in these cases is the application of foreign law to state claims, as determined by a state court. The ruling on Nicaraguan damage law is not a question of federal law, and it is certainly not "an important question of federal law which should be decided by the Court." Sup. Ct. R. 10.1.

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[11] Counsel for the "Republic of Nicaragua" has filed an *amicus curiae* brief in support of the petition for writ of certiorari. The *amicus* brief appears to have been authorized by the Ministry of Foreign Relations of Nicaragua, *see* Pet. A - 60, but the present Attorney General of Nicaragua apparently has not authorized the filing of an *amicus* brief in this Court. *See* App. 5a-9a.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Statutes and General Provisions

Constitution of Nicaragua

Art. 38 (In original Spanish):

La ley no tiene efecto retroactivo, excepto en materia penal cuando favorezca al reo.

Art. 38 (In English translation):

The law does not have retroactive effect, except in criminal matters when it favors the accused.

Art. 138(2) (In original Spanish):

Son atribuciones de la Asamblea Nacional . . . la interpreción auténtica de la ley.

Art. 138(2) (In English translation):

The functions of the National Assembly are . . . to officially interpret the law.

Art. 165 (In original Spanish):

Los Magistrados y Jueces en su actividad judicial, son independientes y sólo deben obediencia a la Constitución y a la ley[.]

Art. 165 (In English translation):

Magistrates and judges, in their judicial capacity are independent and should only obey the Constitution and the law[.]

Art. 182 (In original Spanish):

La Constitución Polítca es la carta fundamental de la República; las demás leyes están subordinadas a ella. No tendrán valor alguno las leyes, tratados, órdenes o disposiciones que se opongan o alteren sus disposiciones.

Art. 182 (In English translation):

The Political Constitution is the fundamental document of the Republic; all other laws are subordinated to the Constitution. Laws, treaties, orders or dispositions which are opposed to the Constitution or alter its provisions shall not have any effect.

Code of Civil Procedure of Nicaragua

Art. 194 (In original Spanish):

Los tribunales y Jueces aplicarán de preferencia:

1. La Constitución
2. Las leyes y decretos legislativos; y
3. Los acuerdos y decretos ejecutivos.

En ningún caso atenderán a disposiciones o reformas hechas en oficio.

Art. 194 (In English translation):

The Tribunals and Judges shall apply in order of preference:

1. The Constitution
2. Legislative laws and decrees;
3. Executive agreements and decrees.

In no case may they rely on provisions or reforms made ex officio.

Civil Code of Nicaragua

§ III, Título Preliminar, Interpretación de la ley,
XVI (In original Spanish):

Al aplicar la ley, no puede atrubuírsele otro sentido que el que resulta explícitamente de los términos empleados, dada la relación que entre los mismos debe existir y la intención del legislador.

§ III, Preliminary Title, Interpretation of the law, XVI (In English translation):

In applying the law, there cannot be attributed any meaning other than that which results explicity from the terms used, given the relationship which should exist between them and the intention of the legislator.

Art. 1835 (In original Spanish):

Las obligaciones derivadas de la ley no se presumen. Sólo son exigibles las expresamente determinadas en este Código o en las leyes especiales, y se regirán por los preceptos de la ley que las hubiere establecido, y en los que ésta no hubiere previsto, por las disposiciones del presente Libro.

Art. 1835 (In English translation):

The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the special laws, and they shall be governed by the precepts of the legislation that established them and, with respect to matters that the legislation did not provide for, by the dispositions of this present book.

Art. 2509 (In original Spanish):

Todo aquel que por dolo, falta, negligencia o imprudencia o por un hecho malicioso causa a otro un daño está obligado a repararlo junto con los perjuicios.

Art. 2509 (In English translation):

Everyone who by intentional misconduct, fault, negligence or imprudence or by a malicious act causes injury to another is obligated to repair it along with the harms.

Penal Code of Nicaragua

Art. 46 (In original Spanish):

La indemnización de perjuicios se hará determinando prudencialmente el Tribunal, a falta de prueba, el valor del perjuicio material o moral originado por el hecho punible y

especialmente el perjuicio causado en la industria o negocio, en la vida, salud, honra o reputación del ofendido.

Art. 46 (In English translation):

The indemnification of damages shall be made prudentially by the court, if there is lack of proof, by determining the value of the pecuniary or moral damage caused by the punishable act and especially the damage caused in the industry or business, life, health or reputation of the victim.

Art. 52 (In original Spanish):

Todas las gestiones para la indeminzación de daños y perjuicios o reparación del daño causado, se ventilarán en juicio civil, una vez ejecutoriada la sentencia que en lo criminal declare la responsabilidad del culpable para tales indemnizaciones o reparaciones, ...

Art. 52 (In English translation):

All requests for the indemnification of damages or reparation of the harm caused shall be made in the civil trial, once the judgment of the criminal trial has been enforced, declaring the liability of the guilty person for such damages. . . .

Art. 76 (In original Spanish):

Nadie puede ser juzgado dos veces por el mismo delito.

Art. 76 (In English translation):

No one shall be tried twice for the same offense.

PROCURADURIA GENERAL DE JUSTICIA

C O N S T A N C I A

CARLOS HERNANDEZ LOPEZ, Procurador General de Justicia de la República de Nicaragua, nombrado el día 10 de Enero de 1994 por la Excelentísima Presidenta de Nicaragua, Señora Violeta Barrios de Chamorro, HACE CONSTAR: Que, dentro del lapso de tiempo transcurrido desde su nombramiento, no ha otorgado autorización a ningún Abogado, Bufete de Abogados, Instituciones u Organismos Estatales o no Estatales, personas naturales o jurídicas, que tengan su domicilio o residencia dentro o fuera de Nicaragua, para que en nombre y representación de la Procuraduría General de Justicia de la República de Nicaragua, en forma separada o conjunta, elaboren ninguna clase de alegato "**Amicus Curiae**", ni ninguna otra clase de alegato, para ser presentado o gestionada su admisión, en alguna Corte de los Estados Unidos de América, con motivo del accidente de aviación de TAN-SAHSA ocurrido el día 21 de Octubre de 1989 en la República de Honduras, Centroamérica.

A solicitud de parte interesada y para los efectos de ley, se extiende el presente documento en la ciudad de Managua, Nicaragua, a los dieciseis días del mes de Mayo de Mil Novecientos Noventa y Cuatro.

/s/ CARLOS HERNANDEZ LOPEZ
CARLOS HERNANDEZ LOPEZ
Procurador General de Justicia

[Procuraduria General de Justicia
Republica de Nicaragua
Republica de Nicaragua,
America Central]

Ministerio de Relaciones Exteriores
Dirección General Consular
Managua, Nicaragua

El Ministerio de Relaciones Exteriores de la Republica de Nicaragua "Certifica" que la Firma que antecede y dice: CARLOS HERNANDEZ LOPEZ.

"Es Auténtica y corresponde" a la que a la fecha usa (ba), PROCURADOR GENERAL DE JUSTICIA DE LA REPUBLICA DE NICARAGUA.

Este Ministerio no asume responsabilidad en cuanto al contenido del documento.
Managua 17 de Mayo de 1994.

[Ministerio de Relaciones Exteriores
Republica de Nicaragua
Managua, Nicaragua
America Central]

THELMA PREGO FERNANDEZ
Director
Dirección General Consular

/s/ BERGMAN ZÚNIGA PÉREZ
BERGMAN ZÚNIGA PÉREZ
Sub Director General
Dirección General Consular

REPUBLIC OF NICARAGUA
CITY OF MANAGUA
EMBASSY OF THE UNITED
STATES OF AMERICA

I CERTIFY THAT THE OFFICIAL NAMED BELOW, WHOSE TRUE SIGNATURE AND OFFICIAL SEAL ARE RESPECTIVELY SUBSCRIBED AND AFFIXED TO THE ANNEXED DOCUMENT, WAS ON THIS DAY, EMPOWERED TO ACT IN THE OFFICIAL CAPACITY DESIGNATED IN THE ANNEXED DOCUMENT, TO WHICH FAITH AND CREDIT ARE DUE.

THELMA PREGO FERNANDEZ

/s/ JANE GRAY
JANE GRAY
Consul
18 May 1994

TRANSLATION

[SEAL]
ATTORNEY GENERAL'S OFFICE

CERTIFICATE

CARLOS HERNANDEZ LOPEZ, Attorney General of the Republic of Nicaragua, appointed on January 10, 1994, by the Hon. President of Nicaragua, Mrs. Violeta Barrios de Chamorro, CERTIFIES: That during the period of time elapsed since his appointment, he has not conferred authorization to any Lawyer, Lawyers' Office, Government or Non-Government Institutions or Agencies, natural or juristic persons having their domicile or residence either within Nicaragua or without, to prepare, either jointly or severally, on behalf and in representation of the Attorney General's Office of the Republic of Nicaragua, any type of *amicus curiae* brief or any other type of brief to be submitted to any Court of the United States of America, or to take any steps aimed at the admission thereof in any Court of the United States of America, in connection with TAN-SAHSA's aircraft accident which occurred on October 21, 1989, in the Republic of Honduras, Central America.

I hereby issue these presents, at the request of the interested party and for all legal purposes, in the city of Managua, Nicaragua, this sixteenth day of May one thousand nine hundred ninety-four.

(Signed)
CARLOS HERNANDEZ LOPEZ
Attorney General
[AFFIXED SEAL READS:
ATTORNEY GENERAL'S OFFICE
REPUBLIC OF NICARAGUA
REPUBLIC OF NICARAGUA, CENTRAL AMERICA]

TRANSLATION

MINISTRY OF FOREIGN AFFAIRS
GENERAL CONSULAR OFFICE
MANAGUA, NICARAGUA

The Ministry of Foreign Affairs of the Republic of Nicaragua "CERTIFIES" that the foregoing Signature, which reads: CARLOS HERNANDEZ LOPEZ, "is an authentic Signature and corresponds" to the hand being set to date/to the hand which used to be set to date by the ATTORNEY GENERAL OF THE REPUBLIC OF NICARAGUA.

This Ministry does not assume any liability regarding the contents of the document.

Managua, this 17th day of May, 1994.

Thelma Prego Fernández
Director
General Consular Office

(Signed) Bergman Zúniga
BERGMAN ZÚNIGA PEREZ
DEPUTY GENERAL DIRECTOR
GENERAL CONSULAR OFFICE

[SEAL AFFIXED TO THE TEXT READS:
MINISTRY OF FOREIGN AFFAIRS—
REPUBLIC OF NICARAGUA
MANAGUA–NICARAGUA
CENTRAL AMERICA]

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STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

ISOLINA BERNHARDT, being duly sworn, deposes and says:

1. I am a federally Certified Court Interpreter pursuant to oral and written examinations given by the Administrative Office of the United States Courts, and I am also accredited with the American Translators Association to translate from Spanish into English and from English into Spanish.

2. I hereby certify that I have translated into English the Certificates issued in Managua, Nicaragua, on May 16, 1994, and May 17, 1994, respectively, to the best of my knowledge and ability.

/s/ ISOLINA BERNHARDT
Isolina Bernhardt
Certified Court Interpreter

Sworn to before me this
25th day of May, 1994.

/s/ MARY ANN ROONEY
NOTARY PUBLIC

MARY ANN ROONEY
NOTARY PUBLIC, State of New York
No. 31-4672706
Qualified in New York County
Commission Expires May 31, 1994

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NOS. 92-1408 & 92-925
(CONSOLIDATED)

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Defendants-Appellants,

—v.—

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors, and CLAUDIA CROW, for herself and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents, et al.,

Plaintiffs-Appellees.

APPELLANTS' REPLY TO MOTION FOR REHEARING

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PRELIMINARY STATEMENT

Unsuccessful in their attempted use of a "consulta" to influence this Court, plaintiffs now introduce *post hoc* legislation, enacted "in response" to this Court's March 8, 1993 decision, which completely changes Nicaraguan moral damage law. Plaintiffs' bold attempt to seek the retroactive application of this new law makes a mockery of this Court and Florida's entire judicial system.[1] Plaintiffs' effort, however, is to no avail because Article 38 of the Nicaraguan Constitution provides that "the law does not have retroactive effect, except in criminal matters when it favors the accused." Constitución Polítca de Nicaragua [Nicar. Const.], Art. 38. Florida and federal law also preclude the retroactive application of any new legislation affecting substantive rights. *Anderson v. Anderson*, 468 So.2d 528, 530-31 (Fla. 3d DCA), *rev. denied*, 476 So.2d 672 (Fla. 1985).

The retroactive application of plaintiffs' new law making moral damages available in all civil cases also would violate TAN-SAHSA's due process rights under the Florida and United States Constitutions. Accordingly, plaintiffs' Motion for Rehearing should be denied because the Court's decision did not overlook or misapprehend applicable Nicaraguan law as it existed prior to the enactment of this new legislation.

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[1] Like its predecessor the "consulta", new Law No. 157 reads like a Spanish nutshell version of plaintiffs' brief. The timing and substance of the "consulta" no longer appear coincidental. Indeed, plaintiffs admit that Law No. 157 was passed by the Nicaraguan Assembly "in response to the Panel's opinion." Plaintiffs' Motion for Rehearing at 1, 3. It is difficult to imagine that the Nicaraguan Assembly would have completely overhauled Nicaraguan law on moral damages within the time necessary for plaintiffs to file their Motion for Rehearing without the active involvement of plaintiffs or their agents.

I

RETROACTIVE APPLICATION OF LAW NO. 157 WOULD VIOLATE THE NICARAGUAN CONSTITUTION, FLORIDA LAW AND TAN-SAHSA'S DUE PROCESS RIGHTS

A. The Nicaraguan Constitution Strictly Precludes Retroactive Application of Laws

The centerpiece of plaintiffs' Motion for Rehearing is Law No. 157, *post hoc* legislation passed by the Nicaraguan Assembly on March 23, 1993 "in response" to the Court's decision in this case. Contrary to what plaintiffs would have this Court believe, Law No. 157 cannot be treated as some intervening appellate court decision in a common law jurisdiction. The Nicaraguan Legislature can only act by passing laws. Law No. 157, therefore, can only be treated as new legislation altering substantive rights.

The Nicaraguan Constitution makes no distinction between laws which purport to interpret and laws which modify and specifically forbids retroactive application of any law except in certain criminal matters. Article 38 of the Nicaraguan Constitution expressly provides:

> The law does not have retroactive effect, except in criminal matters when it favors the accused.

(App. 3).[2] Article 182 of the Nicaraguan Constitution provides that the Constitution is the supreme law of the land.

> The Political Constitution is the fundamental document of the Republic; all other laws are subordinated to the

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[2] In Spanish:

> La ley no tiene efecto retroactivo, excepto en materia penal cuando favorezca al reo.

(App. 2). Nicaragua's prohibition against retroactive application of law is consistent with the general practice in civil law countries. *See generally* John Henry Merryman, *The Civil Law Tradition* 77 (1969) (noting the civil law "rule against retroactivity").

> Constitution. Laws, treaties, orders or dispositions which are opposed to the Constitution or alter its provisions shall not have any effect.

(App. 5).[3] *See also* Article 194 of the Nicaraguan Code of Civil Procedure (providing that tribunals and judges shall apply, in order of preference, (1) the Constitution, (2) Legislative laws and decrees, and (3) Executive agreements and decrees). Plaintiffs fail to cite any Nicaraguan law or legal principle to support their argument that new Law No. 157 should be applied retroactively.

Because the Nicaraguan Constitution mandates that laws shall not have retroactive effect, Law No. 157, passed by the National Assembly only 15 days after this Court's decision and "in response" thereto, cannot be applied retroactively to circumvent the authority and integrity of this Court and the Florida judicial system.

B. Law No. 157 Changes Substantive Nicaraguan Law and Alters the Substantial Rights of the Parties

It cannot be disputed that Law No. 157 is a blatant attempt to transform Nicaraguan tort law on the question of moral damages for the sole purpose of circumventing this Court's March 8, 1993 decision. The current Nicaraguan Assembly cannot possibly know what the 1904 Assembly intended when it enacted the Civil Code. Accordingly, Law No. 157 is not an interpretive law at all but rather new legislation enacted in a civil law jurisdiction which alters substantive rights. As such, Law No. 157 cannot be applied retroactively to overturn this Court's March 8, 1993 decision.

Although the general rule is that "disposition of a case on appeal is made in accordance with the law in effect at the time

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[3] In Spanish:

> La Constitución Polítca es la carta fundamental de la República; las demas leyes están subordinadas a ella. No tendrán valor alguno las leyes, tratados, órdenes disposiciones que se le opongan o alteren sus disposiciones.

(App. 4).

of the appellate court's decision, . . . this rule is not applicable when a substantive right is altered." *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983). For the first time in the history of Nicaragua, Law No. 157 creates a civil remedy for moral damages under Article 2509 of the Civil Code. Contrary to its clever and self-serving title, Law No. 157 is not an "authentic interpretation" of the law but a complete transformation of the law which affects the substantive rights of the parties. In *López Cerna v. Palacios Rodas*, June 11, 1952, Corte Suprema de Justicia, Nicar., Bol. Jud. 16053, 16055, the Nicaraguan Supreme Court stated:

> [A] law of interpretation cannot make distinctions which are extraneous to the essential rights which the original law establishes without distorting its basic nature and becoming a modifying law . . . .

(App. 15).[4] Under Nicaraguan law, therefore, the so-called "authentic interpretation" of Law No. 157 is in fact a modification of the law altering essential rights.

Law No. 157 modifies the "substantive" law because "it gives to a party who did not have [it] the legal right to recover substance [moral damages] from a party who did not theretofore have the legal obligation to render or pay that money." *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So.2d 1096, 1098 (Fla. 5th DCA 1985), *aff'd*, 481 So.2d 484 (Fla. 1986). As the Florida Supreme Court held in *L. Ross, Inc.*, " 'it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore, is not a change in the substantive law giving the substantive right which is the basis for the damages.' " 481 So.2d at 485. *See also Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730, 732

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[4] In Spanish:

> [u]na ley aclaratoria no puede hacer distinciones extrañas a lo esencial que establece la original, sin desvirtuar su propio carácter, para convertirse en modificatoria . . . .

(App. 9).

(Fla. 1991) ("Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.").

C. Florida and Federal law Preclude the Retroactive Application of Legislation Affecting Substantive Rights

Florida and federal law also prohibit retroactive application of Law No. 157.[5] "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983). Nothing in Law No. 157 provides for its retroactive application. Indeed, the new law expressly provides that it will take effect *upon publication* "by any means of mass communication." *Ley No. 157, El Nuevo Diario*, March 26, 1993, at 10. (App. 20, 23). *See State Dept. of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 358 (Fla. 1977) (legislature's "inclusion of an effective date . . . rebuts any argument that retroactive application of the law was intended"); *Automobile Ins. Co. of Hartford v. Beem*, 469 So.2d 138, 141 (Fla. 3d DCA 1985)

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[5] In enacting Law No. 157 "in response" to the Court's decision in this case, the Nicaraguan National Assembly presumably was influenced by the *ex parte* lobbying and drafting efforts on behalf of these Nicaraguan plaintiffs who seek to recover *additional* compensation by way of moral damages from the Honduran defendant in this case. If this Court retroactively applies the hastily enacted Law No. 157 to the case at bar, once that decision becomes final and the Nicaraguan plaintiffs are paid their moral damages, the Assembly can just as hastily repeal Law No. 157 to protect Nicaraguan defendants from such damages. Clearly, one of the reasons why the strict rule against retroactive application of legislative enactments is recognized, not only in Nicaragua but in every jurisdiction in the United States, is to prevent this type of manipulation of the law by politicians. *See, e.g.*, 73 Am. Jur. 2d, *Statutes* 350 (1974) ("[C]ourts observe a strict rule of construction against a retrospective operation [of statutes].")

(statute's effective date "is an expressed legislative intent that application of [the] law be prospective").

This Court correctly ruled that Article 2509 of the Nicaraguan Civil Code did not provide for an award of moral damages and correctly based its decision on the language of the Code and its prior legislative history. Law No. 157, a subsequent "modifying law," cannot be applied to overrule this Court's decision on an *ex post facto* basis.

In *Kaisner v. Kolb*, 543 So.2d 732, 738 (Fla. 1989), the Florida Supreme Court, in refusing to apply a statutory amendment which the Legislature specified should be retroactive, stated:

> Subsequent legislatures, in the guise of "clarification," cannot nullify retroactively what a prior legislature clearly intended.

Similarly, in *Fletcher v. Housing Authority of Louisville*, 525 F.2d 532, 535 (6th Cir. 1975), the court stated:

> Legislative action cannot, however, change *ex post facto* what was the intent of prior legislation. Judicial review . . . would be meaningless if we were to allow a losing party to secure statements from a legislature that the courts had misinterpreted the intent of a prior legislature and then to force a reversal of the judicial result based on such an *ex post facto* basis.

Accordingly, both Florida and federal law dictate that Law No. 157 may not be applied retroactively to alter the substantive rights of the parties to this appeal.

D. Retroactive Application of Law No. 157 Would Violate TAN-SAHSA's Due Process Rights Under the United States and Florida Constitutions

Retroactive application of Law No. 157 to this case would violate TAN-SAHSA's due process rights under the Florida and United States Constitutions because "damages and penalties . . . for which [a party] may be held liable cannot be

constitutionally enlarged after the date of the alleged [wrongful act]." *Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411, 414 (Fla. 1990) (holding that attorney fee statute for medical malpractice actions could not be constitutionally applied to action arising out of injury which incurred before effective date of statute). Citizens "cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect." *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077, 1080 (Fla. 1978). Because Law No. 157 alters TAN-SAHSA's substantive rights under Nicaraguan law, the new legislation cannot be applied retroactively without violating TAN-SAHSA's due process rights under the Florida and United States Constitutions. *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So.2d 1096, 1098-99 (Fla. 5th DCA 1985), *aff'd*, 481 So.2d 484 (Fla. 1986) (retroactive application of a statutory change that increases measure of damages would violate defendant's due process rights).

II

NO CONFLICT EXISTS BETWEEN THE COURT'S DECISION AND *GUELMAN*

[Discussion omitted]

III

PLAINTIFFS' MOTION FOR REHEARING IMPROPERLY REARGUES THE MERITS

[Discussion omitted]

CONCLUSION

Plaintiffs' Motion for Rehearing should be denied in all respects. Retroactive application of Law No. 157 would violate the mandate of the Nicaraguan Constitution, established Florida and federal law and TAN-SAHSA's due process rights under the United States and Florida Constitutions.

Respectfully submitted,

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[Service list omitted]

(4)
Supreme Court, U.S.
FILED
JUN 7 1994
OFFICE OF THE CLERK

No. 93-1814

In The

Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES individually, and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

vs.

TRANSPORTES AEREOS NACIONIALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The District Court of Appeal Of Florida, Third District

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

1. The federal questions were properly preserved for review in this Court.

The defendants' primary contention is an effort to finesse the substance of our petition with a procedural argument. They contend that the federal questions we have asked the Court to entertain were not properly preserved for review. We disagree with this contention. Because of the different dates of the critical documents upon which we have relied – the Nicaraguan Supreme Court's advisory opinion and the Nicaraguan National Assembly's "Authentic Interpretation," Law No. 157 – a two-part analysis is required.[1]

With respect to the Supreme Court's advisory opinion, which was rendered after filing of the defendants' initial brief and prior to the filing of our answer brief in the court of appeal, we note that the defendants explicitly invoked the due process clause of the Fourteenth Amendment in the trial court; the trial court explicitly ruled that its determination of Nicaraguan law in the plaintiffs' favor was consistent with the due process rights of the parties; and the defendants explicitly invoked the due process clause in their initial brief in the court of appeal (R. 518-56, 642; appellants' brief, p. 22). Because the defendants were certainly correct that the due process clause required that the result in the case not contradict the "clearly established law" of Nicaragua, we did not challenge this constitutional premise; instead, we accepted it as a constitutional constraint upon the court of appeal's power

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[1] Before we begin that analysis, however, a brief observation is in order concerning the defendants' apparent complaint that these acts of state were procured by the "lobbying efforts" of persons sympathetic to the plaintiffs. This is not a challenge to the authenticity or validity of the acts or to the legality or regularity of the political processes by which they were obtained. It is simply an expression of "sour grapes." These governmental institutions were at all times equally accessible to the defendants, and the only reason that they aligned themselves with the plaintiffs' position is simply that Nicaraguan law allows the recovery of moral damages in these cases.

to resolve the legal question before it, and argued that the "clearly established law" of Nicaragua was precisely what the Supreme Court's advisory opinion said it was.

The decisions relied upon by the defendants for their "raise it in the trial court or waive it" argument hold only that an issue which could have been raised in the trial court, but was not, cannot be argued for the first time on appeal. They do *not* hold that reliance upon a constitutional provision actually raised in the trial court by one party and agreed to by the other party cannot be argued on appeal by the party who agreed with its applicability when it was raised. Once an issue has been raised in the trial court by any party, it is an issue in the proceeding and can properly be argued by either party on appeal. And, of course, once the issue has been raised by one party on appeal and agreed to by the other, the issue is squarely before the court of appeal.

Moreover, when, as here, the issue could not have been raised in the trial court because it arises out of a development which occurs during the pendency of the appeal, it can properly be raised during the appeal. *See City of Miami v. Harris*, 490 So.2d 69 (Fla. 3d DCA 1986) (where United States Supreme Court rendered decision overruling prior precedent while motion for rehearing was pending, court of appeal was required to withdraw its initial decision affirming judgment, grant rehearing, and reverse judgment), *cert. denied*, 479 U.S. 1031 (1987), and the additional decisions cited at page 10 of our petition. We therefore believe that our position here, that the court of appeal violated the plaintiffs' due process rights in failing to follow the "clearly established law" set forth in the Nicaraguan Supreme Court's advisory opinion, was properly preserved for review here.

In any event, after the court of appeal filed its decision and before the decision became final, the Nicaraguan National Assembly enacted Law No. 157. Because that event postdated the decision, our *only* opportunity to bring it to the court of appeal's attention was in a motion for rehearing. And in our motions for rehearing, we explicitly asserted that the due process clause of the Fourteenth Amendment required the court of appeal to follow the "clearly established law" of

Nicaragua, as interpreted and stated by Law No. 157 (App. 22a-25a, 44a-45a, 57a-58a). We also explicitly asserted that settled principles of the doctrine of international comity required the same result; and we relied squarely upon this Court's decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), for that position – not merely upon Florida decisions (which follow *Hilton* in any event), as the defendants contend (App. 49a-57a, 50a).[2] As we noted in our petition, because the court of appeal's decision was not yet final at the time our motions for rehearing were filed, it was permissible to raise this post-decision development by motion for rehearing, and the court of appeal was required to entertain it. *See City of Miami v. Harris, supra.*

A federal question *is* properly preserved for review in this Court when raised in a motion for rehearing, where, as it was here, the question is created by a post-decision development and the litigant's first opportunity to present the question is in a motion for rehearing – or where the state court is, as it was here, required to entertain it, notwithstanding that

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[2] The defendants contend that the act of state doctrine derives exclusively from the doctrine of "domestic separation of powers," and not from general principles of the doctrine of international comity – and that our invocation of the doctrine of international comity was therefore insufficient to invoke the act of state doctrine below. We disagree. The act of state doctrine clearly derives from both doctrines. *See Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990). And reliance upon the whole of the doctrine of international comity was clearly reliance upon all of its parts, including the act of state doctrine. *See Taylor v. Illinois*, 484 U.S. 400 (1988).

The defendants also contend that the act of state doctrine was not violated by the court of appeal, because it did not pass upon the validity of any act of the Nicaraguan government. We disagree. Most respectfully, the court of appeal's refusal to honor the valid enactment of Law No. 157, which was plainly designed to inform it that its interpretation of Nicaraguan law was erroneous and had to be corrected, utterly flouted that perfectly valid act – and its refusal to respect that authoritative act in the very case which it was designed to correct clearly amounted to a violation of the act of state doctrine.

the motion for rehearing is summarily denied without reference to the federal question. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930); *Saunders v. Shaw*, 244 U.S. 317 (1917); *Cole v. Arkansas*, 333 U.S. 196 (1948). We therefore believe that our positions here, that the court of appeal violated the plaintiffs' due process rights and the principle of international comity known as the act of state doctrine in failing to respect Law No. 157, were properly preserved for review here. Any other conclusion, we respectfully submit, would mean that no post-decision, pre-finality development creating a federal question properly brought to the lower court's attention at first opportunity could ever be the subject of review by this Court – and that is plainly not the law.

2. Law No. 157 was a permissible interpretation of existing law, not an impermissible *ex post facto* law.

Next, the defendants squarely concede that the court of appeal's decision flatly contradicts the Nicaraguan National Assembly's "Authentic Interpretation," Law No. 157, but they argue that the court of appeal could properly have ignored it because it was an impermissible *ex post facto* law. We disagree with this contention as well. As the defendants themselves point out, "Article 138(2) of the Nicaraguan Constitution of 1987 . . . vests in the Nicaraguan National Assembly the power to 'officially interpret the law'," while the same Constitution provides in Article 38 that "[t]he law does not have retroactive effect . . . " (Brief in Opposition, pp. 7, 10). Because both of these provisions exist in the same Constitution, they obviously must be read *in pari materia* and each given effect. That reconciliation is found in the perfectly sensible language of Section II, Article IV of the Preliminary Title to the Nicaraguan Civil Code, which reads as follows:

> The law may provide only for the future and shall never have a retroactive effect.

> However, laws which are limited to interpreting the meaning of other laws shall be understood as incorporated into such laws; but said laws shall not affect in any manner whatsoever judicial decisions which are final in the time in between.

Indeed, if Article 38 were read as broadly as the defendants would have the Court read it here, to prevent application of an Interpretative Law to a pending controversy, then the power to "officially interpret the law" given by Article 138(2) would be rendered meaningless. Surely the two provisions must be harmonized, as they have been by the provision of the Civil Code quoted above; and, of course, for this Court to accept the defendants' construction of Article 38, it would have to declare this provision unconstitutional under Nicaraguan law – which would itself be a violation of the act of state doctrine.

Most respectfully, even a cursory reading of Law No. 157 should convince this Court that it is not a new law. It creates no new Articles in any of Nicaragua's existing Codes; it adds no words to any existing Code provisions; and it deletes no words from any existing Code provisions. It is, by its own explicit terms, merely an "Authentic Interpretation" of the meaning of existing laws. According to *Black's Law Dictionary* (6th Ed. 1990), "Interpretation is '[t]he art or process of discovering and ascertaining the meaning of a statute . . . ,' and '[i]n the civil law, *authentic* interpretation of laws is that given by the legislator himself, which is obligatory on the courts' " (pp. 817-18; emphasis in original). And because an "Authentic Interpretation" of existing laws is simply a statement of the meaning of existing laws, no "retroactivity" problem is presented by such an "interpretation."

There is perhaps a better way of making essentially the same point. In the United States, the legislative branches of the various governments are charged with the responsibility of making laws, and the task of "interpreting" the laws belongs to the judiciary. In civil law countries like Nicaragua, however, as the defendants have insisted, the task of "interpreting" the laws belongs (in theory at least), not to the

judiciary, but to the legislature. An "interpretation" of existing Nicaraguan law by the Nicaraguan National Assembly is therefore the functional equivalent of an "interpretation" of existing federal law by this Court. And if this Court had rendered a decision interpreting an existing federal law, the meaning of which was the subject of a pending motion for rehearing in the court of appeal below, that court would have applied that "interpretation" of the law in an instant, without the first concern about any problem of "retroactivity." *See City of Miami v. Harris, supra.* And because Law No. 157 is the functional equivalent in a civil law jurisdiction of such an "interpretative" decision in a common law jurisdiction, it should have been treated the same way by the court of appeal.

In short, the enactment of Law No. 157 was within the Nicaraguan National Assembly's constitutional authority to "officially interpret the law"; there was simply no "retroactivity" or *ex post facto* problem which would even remotely have been implicated by giving effect to that Interpretative Law in this case while it was pending; and the defendants' effort to excuse the court of appeal's studied refusal to accord any respect whatsoever to Law No. 157 is without merit. Indeed, if the defendants' attempted finesse of Law No. 157 were accepted here, then there would be no branch of the Nicaraguan government which had the authority to "officially interpret the law" in existing cases – and that is plainly not the law.

3. The defendants' representations concerning the Nicaraguan Codes and cases are neither fair nor accurate.

Because the relevant provisions of the Nicaraguan Codes are explained with precision and perfect consistency in the Nicaraguan Supreme Court's advisory opinion and the Interpretative Law enacted by the Nicaraguan National Assembly, we saw no need to belabor the details of the underlying provisions in our petition – and we simply referred the Court to the detailed discussion of the relevant code provisions in the plaintiffs' motion for rehearing, at App. 25a-44a. The

defendants have elected to quarrel briefly with the conclusions stated in those documents nevertheless.

For example, the defendants argue that, because Article 2509 of the Nicaraguan Civil Code was derived from Article 1045 of the Civil Code of Costa Rica, the court of appeal correctly "interpreted" Article 2509 to exclude recovery of moral damages, notwithstanding that both the Nicaraguan Supreme Court and the National Assembly plainly stated its meaning to the contrary. If we are given an opportunity to brief the merits of that "interpretation" here, we will demonstrate (as we did in the court of appeal – *see* App. 27a-28a) that the more modern view, adopted by the appellate courts of Costa Rica and touted by current commentators, is that Article 1045 (which has not changed since its enactment, and which itself derives from Article 1382 of the French Code of Napoleon, which authorizes the recovery of moral damages) *does* provide for the recovery of moral damages in Costa Rica – so the defendants' reliance upon Costa Rican law to support the court of appeal's rejection of the Nicaraguan government's interpretation of its own law should ultimately avail the defendants nothing here.

The defendants also argue that, although Article 46 of the Nicaraguan Penal Code plainly authorizes the recovery of moral damages in quasi-criminal (or tort) actions, it does so only upon the criminal conviction of the wrongdoer, and there is no provision in the Nicaraguan Codes providing otherwise. Most respectfully, this is wrong. Article 46 says nothing at all about the need for a criminal conviction or the effect of an acquittal of the tortfeasor on criminal charges.[3] If we are

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[3] Neither does Article 52 of the Penal Code (half of which the defendants have tellingly replaced with an ellipsis in their appendix) say any such thing. On its face, Article 52 says only that civil damages are recoverable from a convicted criminal defendant, and that a request for such damages should be made in a subsequent civil action, rather than in the criminal action. It contains no affirmative prohibition against the recovery of damages in a civil action where there has been no criminal conviction.

given an opportunity to brief the merits here, we will demonstrate (as we did in the court of appeal – *see* App. 32a-44a) that the effect of both convictions and acquittals in criminal proceedings upon subsequent civil suits for damages is explicitly addressed in Articles 2362 and 2363 of the Nicaraguan Civil Code, and in Articles 1122 and 1123 of the Nicaraguan Code of Civil Procedure (all four of which are quoted at App. 33a-34a). And these provisions, as the Nicaraguan National Assembly explained in Law No. 157, authorize (as the law of every jurisdiction in the United States does) the prosecution of a civil tort action against both principal and agent for the recovery of damages, notwithstanding the acquittal of an agent/tortfeasor of criminal charges arising out of the incident. If we are given an opportunity to brief the merits here, we will also provide the Court with three decisions of the Nicaraguan Supreme Court (discussed at App. 35a-42a) which hold exactly that.[4]

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[4] The defendants also argue in footnote 5 of their Brief in Opposition that no judicial decision in the history of Nicaraguan jurisprudence has ever awarded moral damages in a wrongful death case. This statement may be technically accurate, since the parties at least found no such decisions, but the statement is nevertheless purposefully misleading. If we are given an opportunity to brief the merits here, we will provide the Court (as we provided the court of appeal, at pages 22-29 of our answer brief) with three decisions of the Nicaraguan Supreme Court in which moral damages were recovered by *personal injury* plaintiffs under Article 2509 – and, of course, because Article 2509 draws no distinction whatsoever between personal injury and wrongful death cases, these decisions will squarely support our position here. We will also alert the Court to the testimony of the defendants' own expert, who squarely conceded at trial that there is no Nicaraguan Supreme Court decision holding that moral damages are *not* recoverable under Article 2509 or Article 46 (T. 127-28). We will also demonstrate that the sentence quoted in the defendants' footnote is a mistranslation, and does not represent a holding that moral damages are not recoverable under Nicaraguan law; instead, fairly translated and read in context, the sentence is merely an observation that the trial court declined to award the plaintiff moral damages, a ruling which the Supreme Court thereafter declined to overturn because of plaintiff's counsel's failure to raise the issue properly on appeal.

In any event, these details are more properly the subject of a brief on the merits. For our limited purpose here, we continue to insist that the Nicaraguan Supreme Court's advisory opinion and the Nicaraguan National Assembly's Interpretative Law No. 157 should be sufficient by themselves to demonstrate that the court of appeal utterly flouted the authority of the Nicaraguan government, and plainly violated both the plaintiffs' due process rights a..d the act of state doctrine in the process – depriving not merely the plaintiffs, but *scores* of unrepresented Nicaraguan citizens of substantial damage recoveries to which they were plainly entitled under the law of their own nation in at least *34* different wrongful death actions. The decision also provoked an angry response by the Nicaraguan government in the form of a formal diplomatic protest, as well as an amicus brief by that government entreating this Court to grant review, and the decision may therefore imperil continuing friendly relations between the two governments at an exceedingly delicate point in their new relationship.[5] And because the court of appeal wrote its opinion in such a way as to deprive the Florida Supreme Court of any jurisdiction to correct it, and affirmatively refused to certify the case to that Court for further review, the only Court to which it presently owes any accountability at all is this Court. We therefore respectfully urge the Court once

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[5] In a concluding footnote, the defendants assert that the present Attorney General of Nicaragua "apparently has not authorized the filing of an *amicus* brief in this Court." Counsel was engaged for the filing of *amicus* briefs in both the Florida Supreme Court and this Court by the present Attorney General's immediate predecessor-in-office, however, and that authorization was not thereafter withdrawn. That authorization was also recently reaffirmed, after the present Attorney General took office, by Nicaragua's Minister of Foreign Relations (App. 60a-63a). Now that the present Attorney General has been advised of these things, of which he was apparently not informed when the defendants approached him and obtained the certificate included in their appendix, he too has affirmatively "ratified" his predecessor's prior authorization (Supp. App. 1a). Whatever the defendants may have intended to suggest in their concluding footnote is therefore a non-issue here.

again to exercise the supervisory jurisdiction it plainly possesses, and to issue a writ of certiorari to review the court of appeal's incomprehensible decision.

Respectfully submitted,

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Letter issued by Attorney General of Nicaragua (in English Translation) 1a

[TRANSLATION]

OFFICE OF THE SOLICITOR GENERAL

Managua, May 31, 1994

COPY

Dr. Alvaro Ramírez González, President
Nicaraguan Association of Democratic Jurists
Managua

Dear Dr. Ramírez:

In reply to your kind letter of the 28th of this month, I wish to state as follows:

1. The affidavit I signed on May 16th of this year stated very clearly that during my tenure in the position assumed on January 10, 1994 on appointment by her Excellency, Madame President of the Republic, Mrs. Violeta Barrios de Chamorro, I have neither authorized nor delegated any law office, institution or organization, governmental or otherwise, or any individuals or legal entities, to prepare on behalf of, and representation of the Solicitor General's Office of the Republic of Nicaragua, any kind of allegation to be presented or filed with any Court of the United States of America, regarding the TAN/SAHSA aircraft accident that took place on October 21, 1989 in Honduras.

   Once again, I reiterate the terms of this affidavit.

2. I also wish to attest to the fact that there is on file in the archives of the Nicaraguan Solicitor General's office, a motion by the Republic of Nicaragua dated December 8, 1993, by which the previous Solicitor General, Dr. Guillermo Vargas Sandino addressed the Supreme Court of Florida under the title "MOTION OF THE REPUBLIC OF NICARAGUA TO INTERVENE AS A PETITIONER, AND ALTERNATIVE

MOTION TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION". This motion expresses the official posture of the Government of Nicaragua, which we ratify for all purposes.

I take advantage of this occasion to greet you.

Sincerely,

[ILLEGIBLE SIGNATURE]

Carlos Hernández López
Solicitor General

[STAMP];
SOLICITOR GENERAL
REPUBLIC OF
NICARAGUA

cc: Engineer Antonio Lacayo, Minister of the Presidency
Engineer Ernesto Leal, Minister of Foreign Relations
Dr. José Bernard Pallais, Vice Minister of Foreign Relations

TRANSLATOR'S CERTIFICATION

June 2, 1994

THE UNDERSIGNED HEREBY CERTIFIES:

1. That he is an English-Spanish, Spanish-English Interpreter certified by the U.S. Government to function in the Federal Court system and accredited by the American Translators Association.

2. That the attached translation of

   AFFIDAVIT OF 5/31/94 BY THE NICARAGUAN SOLICITOR GENERAL, done for BRUMM, VEGA & ASSOCIATES on this date, from Spanish into the English language, is faithful and accurate to the best of his ability.

Signed: John Todaro
John Todaro
Federally Certified
Interpreter

Sworn to and subscribed before me this 2nd day of June, 1994.

MIREYA VEGA
MY COMMISSION
CC 374146
(SEAL) EXPIRES:
June 18, 1998
Bonded Thru Notary
Public Underwriters

/s/ Mireya Vega
Mireya Vega
Notary Public, State of
Florida at Large.

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